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No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME II

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MEMORANDUM OPINION

KOLLAR-KOTELLY, *District J.*

I. INTRODUCTION

The recent issues confronting Congress related to campaign finance are neither novel nor unfamiliar:

> The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public. It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.

Elihu Root, *Addresses on Government and Citizenship* 143 (Bacon and Scott ed. 1916) (original statement made before the Constitutional Convention of the State of New York in 1894).

> Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest.

65 Cong. Rec. 9507-9508 (1924) (Statement of Sen. Joseph Robinson).

> We all know that money is the chief source of corruption. We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue; and for the purpose of paying the expenses of campaigners sent out into the country to spread propaganda, both true and untrue.

86 Cong. Rec. 2720 (1940) (Statement of Sen. John Bankhead).

> The unchecked rise in campaign expenditures coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors.

H.R. Rep. No. 93-1239, at 3 (1974).

> We have gone from basically a small donor system in this country where the average person believed they had a stake, believed they had a voice, to one of extremely large amounts of money, where you are not a player unless you are in the $100,000 or $200,000 range, many contributions in the $500,000 range, occasionally you get a $1 million contribution. . . . Many Members are tired of picking up the paper every day and reading about an important issue we are going to be considering, one in which many interests have large sums at stake and then the second part of the story reading about the large amounts of money that are being poured into Washington on one side or the other of the issue—the implication, of course being clear, that money talks and large amounts of money talk the loudest.

147 Cong. Rec. S2958 (daily ed. March 27, 2001) (statement of Senator Fred Thompson). Although these statements each reflect discrete points in the history of campaign finance regulation in this country, they reflect the same sentiment: over the course of the last century, the political branches have endeavored to protect the integrity of federal elections with carefully tailored legislation addressing corruption or the appearance of corruption inherent in a system of donor-financed campaigns.

In the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time. For example, consistent with the Constitution, Congress has been permitted to prohibit the use of corporate treasury funds for contributions and expenditures to federal candidates and their parties, forbid the use of union dues in connection with federal elections, cap contributions by individuals to candidates and parties, offer presidential candidates the option of financing their general election campaigns with money from the public fisc, and subject coordinated expenditures to contribution limitations. This process has been evolutionary, and the deliberative nature of the legislative effort is not unexpected given the fact that campaign finance is an extraordinarily challenging area to legislate, particularly given the strong First Amendment interests at stake. On the one hand, congressional action in this area plainly implicates an individual's right to be free from government regulation, a right that is unquestionably at its apogee in the context of political speech. On the other hand, legislation in this area is designed to embolden public confidence in the political system, which thereby ultimately encourages individuals to participate and engage in the electoral process. *See Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n* ('*Colorado I*'), 518 U.S. 604, 609 (1996) (per curiam) (observing that in assessing the constitutionality of FECA's various provisions the Supreme Court 'essentially

weigh[s] the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption'); *see also Burson v. Freeman,* 504 U.S. 191, 198 (1992) ('Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings.').

Mindful of these competing constitutional interests, Congress has moved deliberately and often slowly to address evasion or abuse of the law. Building a consensus in an area so penetratingly close to the heart of the First Amendment requires serious consideration. In fact, in the case of the legislation presently before the Court, the legislative process took over six years of study and reflection by Congress.[1]

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[1] Although campaign finance reform was considered during the 104th Congress, *see, e.g.,* Campaign Reform Act of 1996, H.R. 3820, 104th Cong. (1996) (considered on the House floor, but failed by a vote of 162-259, 142 Cong. Rec. H8,516 (daily ed. July 25, 1996)), deliberations on BCRA's precursors did not begin until the One Hundred and Fifth Congress. The bills introduced in the One Hundred and Fifth Congress, One Hundred and Sixth Congress, and One Hundred and Seventh Congress, relating to campaign finance, include, but are not limited to: 'Bipartisan Campaign Reform Act of 1997,' H.R. 493 (105th Cong.); 'Campaign Reform and Election Integrity Act of 1998,' H.R. 3485 (105th Cong.); 'Campaign Finance Improvement Act of 1998,' H.R. 3476 (105th Cong.); 'Bipartisan Campaign Integrity Act of 1997,' H.R. 2183 (105th Cong.); 'Campaign Reporting and Disclosure Act of 1998,' H.R. 3582 (105th Cong.); 'Bipartisan Campaign Reform Act of 1997,' S. 25 (105th Cong.); 'Senate Campaign Financing and Spending Reform Act,' S. 57 (105th Cong.); 'Campaign Finance Reform and Disclosure Act of 1997,' S. 179 (105th Cong.); 'Clean Money, Clean Elections Act,' S. 918 (105th Cong.); 'Grassroots Campaign and Common Sense Federal Election Reform Act of 1998,' S. 1689 (105th Cong.); 'Voter Empowerment Act of 1999,' H.R. 32 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' H.R. 417 (106th Cong); 'Clean Money, Clean Elections Act,' H.R. 1739 (106th Cong.); 'FEC Reform and Authorization Act of 1999,' H.R. 1818 (106th Cong.); 'Campaign Integrity Act of 1999,' H.R. 1867 (106th Cong.); 'Citizen Legislature and Political Freedom Act,' H.R. 19 22 (106th Cong.); 'Campaign Reform and Election Integrity Act of 1999,' H.R. 2668 (106th Cong.); 'PAC Limitation Act of 1999,' H.R. 2866 (106th Cong.); 'Open and Accountable Campaign Financing Act of 2000,' H.R. 3243 (106th Cong.); 'FEC Reform and Authorization Act of 2000,' H.R. 4037 (106th Cong.); 'Campaign Finance Improvement Act of 2000,' H.R. 4685 (106th Cong.); 'Campaign Finance Disclosure on Sales of Personal Assets Act of 2000,' H.R. 4989 (106th Cong.); 'Informed Voter Act of 2000,' H.R. 5507 (106th Cong.); 'Campaign Finance Improvement Act of 2000,' H.R. 5596 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' S. 26 (106th Cong.); 'Federal Election Enforcement and Disclosure Reform Act,' S. 504 (106th Cong.); 'Clean Money, Clean Elections Act,' S. 982 (106th Cong.); 'Bipartisan Campaign Reform Act of 1999,' S. 1593 (106th Cong.); 'Campaign Finance Integrity Act of 1999,' S. 1671 (106th Cong.); 'Open and Accountable Campaign Financing Act of 2000,' S. 1816 (106th Cong.); 'Campaign Finance Reform and Disclosure Act of 2000,' S. 2565 (106th Cong.); 'Bipartisan Campaign Reform Act of 2001,' H.R. 2356 (107th Cong.); 'Campaign Reform and Citizen Participation Act of 2001,' H.R. 2360 (107th Cong.); and 'Bipartisan Campaign Finance Reform Act of 2001,' S. 27 (107th Cong.).

This thoughtful and careful effort by our political branches, over such a lengthy course of time, deserves respect. *See, e.g., Rust v. Sullivan,* 500 U.S. 173, 223-224 (1991) (O'Connor, J., dissenting) ('This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with great gravity and delicacy when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment.') (internal quotation marks and citations omitted); *see also FEC v. Nat'l Right to Work Comm.,* 459 U.S. 197,209 (1982) ('This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.') (citation and quotation marks omitted). Nevertheless,

it is the province of the judiciary to intervene when Congress has struck the wrong balance and disproportionately transgressed First Amendment rights in the name of reform. While navigating this balance is undoubtedly complex, such a task is demanded by the dictates of the Constitution and the well worn path of interpretation of congressional action relating to campaign finance legislation by the Supreme Court of the United States.

It is within this historical framework that the incremental changes Congress strives to accomplish in enacting the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ('BCRA') are properly understood. BCRA is yet another step in the careful evolution of the campaign finance laws targeted at addressing exceptions to the constitutionally permissible laws that are already in force. Indeed, BCRA was enacted in large measure to amend the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* ('FECA'), and any constitutional interpretation of BCRA must, as its starting point, recognize the role BCRA plays within the current state of federal law. In other words, it must be remembered that the statutory provisions at issue were designed by Congress as a comprehensive approach to the abuses of FECA that legislators and candidates were acutely aware of in their capacity as political actors.[2] BCRA

[2] As Senator Fritz Hollings wryly observed during the Senate debate on BCRA:

> It amused me the other day when they said we finally had some debate going on in the Senate. The reason we have a debate is because this is the first subject we know anything about. All the rest of it is canned speeches that the staff gives you, and you come out and you talk about Kosovo, you talk about the defense budget, or you talk about the environment, and you read scientific statements and everything - but we know about money. Oh boy, do we know.

147 Cong Rec. S2852-53 (daily ed. March 26, 2001) (statement of Senator Fritz Hollings).

was designed to ameliorate FECA's most glaring abuses, while staying true to the constitutional boundaries set forth by the judiciary.

Presently before this three-judge District Court are eleven consolidated actions challenging much of BCRA as unconstitutional and seeking declaratory and injunctive relief to prohibit its enforcement. Plaintiffs and Defendants have filed cross motions for judgment pursuant to Rule 54 of the Federal Rules of Civil Procedure. Suffice it to say, the legal challenges raised by this litigation are complex and raise issues of fundamental importance to the conduct and financing of federal election campaigns.

In resolving these challenges, I have endeavored to adopt a cohesive constitutional framework in adjudicating Plaintiffs' claims, premised on the extensive record in this case and Supreme Court precedent. It is an approach that I believe is consistent with our common law traditions: a decision is rooted in the record of this case and guided by the constitutional boundaries established by the Supreme Court's campaign finance jurisprudence. Under this approach, I have only found three of the challenged sections unconstitutional: Sections 213, 318, and 504. The provisions I have found unconstitutional are all provisions of BCRA that are not central to its core mission and are entirely severable without doing injustice to the remainder of the law. The rest of the challenged provisions I find either constitutional or nonjusticiable, with the small exception, as observed in the *per curiam* opinion, of one disclosure provision contained in Section 201. In the case of Section 201, Judge Leon and I have severed subsection (5) of Section 201; a relatively minor change that does not impair the remaining disclosure provisions of the Act.[3]

[3] I cannot agree with Judge Henderson, who appears to characterize my opinion, along with the *per curiam* opinion, and Judge Leon's opinion, as

II. FINDINGS OF FACT

Reviewing a record in a case involving protected First Amendment rights requires serious examination and analysis of the underlying testimony and documentary evidence. Therefore, with few exceptions, I have not relied on or cited to the Findings of Fact proposed by the litigants. To ensure accuracy and to eliminate any gloss or characterizations added by the parties, I have reviewed and cited the underlying documents, depositions, or declarations and have, in many instances, chosen to quote directly from the original sources.[4]

'upholding a portion [of BCRA] here and striking down a fragment [of BCRA] there until *they* [Judge Leon and Judge Kotelly] have drafted legislation the Congress would never have enacted—all in the name of *deference* to that body.' Henderson Op. at 5 (first emphasis added, second emphasis in original). I would observe that my opinion does not sift through various sections of BCRA that have been challenged, adopting some and rejecting others. Rather, my decision is predicated on lengthy discussions of both the record and the governing caselaw. In undertaking this analysis, I have only found three sections unconstitutional in their entirety; the same three sections that Judge Henderson and Judge Leon have each found unconstitutional. I have also, with Judge Leon, severed one section from a disclosure provision in Section 201; but this is no different from Judge Henderson severing a phrase from Section 323(e). Henderson Op. at Part IV.D.4. Itis also important to note that I have not 'drafted legislation.' *Id.* Nothing in my opinion rewrites BCRA in any manner whatsoever. I have accepted the statute on its face, finding its core provisions constitutional, with exceptions noted above as to some ancillary provisions.

[4] Almost exclusive reliance on the litigants' proposed findings of fact, which I have already indicated is a method of fact finding that I do not employ, should lead to a careful examination by the reviewing Court of the adopted findings. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1404 (D.C. Cir. 1988) (per curiam) ('While 'the fact that the trial judge has adopted proposed findings does not, by itself, warrant reversal,' 'it does raise the possibility that there was insufficient independent evaluation of the evidence and may cause the losing party to believe that his position has not been given the consideration it deserves.'') (quoting *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 (9th Cir.1978)); *id* at 1408.

I have endeavored to develop a factual record that is commensurate with my legal approach. Accordingly, even though in regard to my Conclusions of Law I am in dissent on most of Title I, as well as in dissent with regard to the primary definition of electioneering communication in Title II, I have found it appropriate to adequately set forth the bases of my Factual Findings to assist the appellate review of the three-judge District Court's decisions, and because the nature of my legal positions demand it.

Having set forth the following preliminaries, I now turn to my Findings of Fact. While the record is exhaustive-replete with multiple sources for each point-I have focused on selecting from the complete record, facts that are probative in supporting my legal conclusions, distinguishing, where appropriate, between disputed and uncontroverted evidence. In short, I have exercised my discretion to be selective without sacrificing, to the best of my ability, my due diligence.[5]

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[5] I am compelled to respond to Judge Henderson, who, without *any elaboration*, has criticized three of my Findings in particular as leaving her "with the definite and firm conviction that a mistake has been committed.' Henderson Op. at 67 n.55 (quoting *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing my Findings ¶¶ 2.13; 1.82-1.83). In the examples Judge Henderson cites, she points to two summaries and an introduction; ignoring the surrounding Findings in support of the evidentiary record. I have in my Findings discussed in great detail the foundation and basis for the particular Findings she cites. *See infra* Findings ¶¶ 2.8, 2.8.1- 2.8.3.5; 1.73-1.81; 1.83.1-1.83.7. Judge Henderson does not assail that analysis nor does she in any way indicate a reasoned basis for her disagreement. As such, I must respectfully disagree with her view that a 'mistake has been committed' in regard to these three Findings of Fact.

In addition, although Judge Henderson determines that the record is largely superfluous to her legal conclusions, *see* Henderson Op. at 7 n.1 ('[a]lthough the actions before us have produced a large (*but probably*

TITLE I: BCRA NONFEDERAL MONEY ('SOFT MONEY') PROVISIONS

National Party Nonfederal Money Fundraising and Spending

1.1 As discussed both in the *per curiam* opinion and my own conclusions of law, FECA was silent on how to draw lines around money raised outside of FECA's source and amount limitations for political parties to spend on activities that were expected not to be used for the purpose of influencing a federal election. The FEC's opinions and rulemakings drew that line by permitting state and national party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state parties began to raise so-called 'soft money,' which described these nonfederal funds-not subject to FECA limits and restrictions-to pay for a share of election-related activities.

1.2 It is undisputed that over the past two decades the parties have raised and spent an increasing amount of nonfederal funds.

1.3 In 1980 the national Republican party spent roughly $15 million in soft money, the Democrats $4 million. This

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unnecessary) *record*") (emphasis added), she seemingly urges the Supreme Court to adopt her 'Alternative Findings of Fact' 'as an alternative to those of the majority,' *id.* at 67, and in conclusory fashion alleges mistakes in the Findings of Fact of the 'majority,' without any specificity. *Id.* Given that Judge Henderson's findings are 'an alternative to those in the majority,' I have not found it prudent to catalogue each instance where I disagree with her factual conclusions. I would simply observe that I respectfully disagree that Judge Henderson's 'Alternative Findings of Fact' are a more appropriate and accurate 'alternative to those [Findings of Fact] of the majority.' *Id.*

constituted 9% of total spending by the two national parties. In 1984 the amount of soft money spent by the national parties increased marginally to $21.6 million but it constituted a smaller share (5%) of total national party activity. In 1988 . . . . [p]arty soft money spending more than doubled to $45 million, which was 11% of national party totals . . . . By 1988, both parties had developed effective means of courting large soft money donors. After the election, Republicans revealed that they had received gifts of $100,000 each from 267 donors; Democrats counted 130 donors contributing $100,000 or more. . . . Mann[6] Report at 12-13 [DEV 1-Tab 1] (citations omitted).

1.4 The FEC began tracking nonfederal donations in the 1992 election cycle. During that cycle the Democratic and Republican parties together raised $86.1 million in nonfederal funds. During the 1994 election cycle the two major parties raised $101.6 million in nonfederal funds; during the 1996 election cycle they raised $263.5 million in nonfederal funds; during the 1998 election cycle they raised $222.5 million in nonfederal funds; during the 2000 election cycle they raised $487.5 million in nonfederal funds; and during the 2002 election cycle they raised $495.8 million in nonfederal funds. *See* FEC, News Release: Party Fundraising Reaches $1.1 Billion in 2002 Election Cycle (Dec. 18, 2002), *available* at http:// www.fec.gov/press/20021218party/20021218party.html.

1.4.1 There was

> a threefold increase in national party soft money activity between 1992 and 1996—from $80 million to $272 million. Soft money as a share of total national party spending jumped from 16% to 30%. Both parties and

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[6] Thomas Mann is one of Defendants' experts. I note that neither Plaintiffs nor Defendants have challenged the qualifications of any of the designated experts in this case.

> their elected officials worked hard to solicit soft money donations from corporations, wealthy individuals, and labor unions. During the 1996 election the national party committees received . . . approximately 27,000 contributions from federally prohibited sources . . . Less than $10 million of the $272 million was contributed directly to state and local candidates in the 1996 cycle. . . . The two parties transferred a total of $115 million in soft money to state party committees, which financed two-thirds of state party soft money expenditures. . . . State party soft money expenditures for political communication/advertising jumped from less than $2 million in 1992 to $65 million in 1996.

Mann Report at 21-22 [DEV 1-Tab 1] (citation omitted). During the 1996 election cycle, the top 50 nonfederal money donors made contributions ranging from $530,000 to $3,287,175. *Id.* at 22. Three of the top 50 nonfederal money donors to the national political parties in 1996 were state political parties. Mann Expert Report Tbl. 5 [DEV 1-Tab 1].

1.4.2

> The total amount of soft money spent [in the 1998 midterm election cycle]—$221 million—was less than in 1996 but more than double the previous midterm election. And soft money as a share of total spending by the national parties jumped to 34%. The congressional party campaign committees put a premium on raising and spending soft money to advance the election prospects of their candidates. . . . Both national party committees had discovered they could finance campaign activity on behalf of their senatorial candidates with soft money in the form of 'issue advocacy.' The same pattern, more pronounced with the Democrats than the Republicans, was evident in the House campaign committees.

Mann Report at 23 [DEV 1-Tab 1] (citation omitted).

1.4.3

> [S]oft money financing of party campaigning exploded in the 2000 election cycle. Soft money spending by the national parties reached $498 million, now 42% of their total spending. Raising a half billion dollars in soft money [in 2000] took a major effort by the national parties and elected officials, but they had the advantage of focusing their efforts on large donors. . . .The top 50 soft money donors . . . each contributed between $955,695 and $5,949,000. Among the many soft money donors who gave generously to both parties were Global Crossing, Enron and WorldCom.

Mann Report at 24-25 [DEV 1-Tab 1] (citation omitted). 'A total of $280 million in soft money—well over half the amount raised by the six national party committees—was transferred to state parties [in 2000], along with $135 million in hard money.' *Id.* at 26. 'By contrast, the national parties contributed . . . only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000.' Mann Report at 26 [DEV 1-Tab 1] (citation omitted). The table below 'shows the trend in hard and soft money donations to the political parties since the 1991-1992 election cycle, when the FEC first began tracking these figures. Soft money donations rose from $86.1 million to $495.1 million between 1991-2 and 1999-2000, but hard money contributions rose markedly as well, from $445 million to $741 million.' Green[7] Expert Report at 30 [DEV 1-Tab 3].

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[7] Donald Green is one of Defendants' experts.

	1991-92	1993-94	1995-96	1997-98	1999-2000
Hard Money	$445.0	$384.7	$638.1	$445.0	$741.0
Soft Money	$86.1	$101.6	$262.1	$224.4	$495.1
Total	$531.1	$486.3	$900.2	$669.4	$1,236.1

Id. (Tbl. 1: National Party Receipts 1992-2000) (figures in millions) (based on 'FEC Reports Increase in Party Fundraising for 2000' release of May 15, 2001). Defendants' expert Donald Green points out that while the amount of money flowing into the campaign finance system has continued to grow, 'the lawmakers subject to its influence remain constant in number.' Green Rebuttal Report at 22 [DEV 5-Tab 1].

1.4.4 During the first 18 months of the 2001-2002 election cycle the parties reported nonfederal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. The FEC notes that this increase is 'all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns.' Press Release, Federal Election Commission, Party Fundraising Growth Continues (Sept. 19, 2002) FEC141-0001 [DEV 28]. By October 16, 2002, the parties had raised over $421 million in nonfederal funds. News Release, Federal Election Commission, National Party Fundraising Strong in Pre-Election Filings, *available at* http://www.fec.gov/press/20021030partypre.html/20021030party pre.html.

The Rise of Nonfederal Money Spending

1.5 The figures above demonstrate that although nonfederal receipts and spending began to grow in the 1980s, this trend accelerated beginning in 1996.

1.6 Experts from both parties attribute the accelerated rise in nonfederal money spending to President Bill Clinton and his political consultant Dick Morris' use of such funds during the 1996 campaign to fund

> television ads designed to promote Clinton's reelection. While the ads prominently featured the President, none of these costs were charged as coordinated expenditures on behalf of Clinton's campaign. Instead the party paid the entire cost, based on a legal argument never before made: that party communications which did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising and financed, according to the FEC allocation rules, with a mix of soft and hard money.

Mann Report at 18 [DEV 1-Tab 1]. In the words of Plaintiffs' expert Raymond La Raja, this 'maneuver . . . catapulted soft money.' La Raja Cross Exam. Ex. 3 at 45 [JDT 15] (Raymond Joseph La Raja, American Political Parties in the Era of Soft Money (2001) (unpublished Ph.D. dissertation, University of California at Berkeley).

> The strategy to deploy soft money for [political advertising] is described in a series of memos from Dick Morris . . . . Morris says, 'I met with . . . attorney [s] . . . and explained the kinds of ads I had in mind. Fortunately, they said the law permitted unlimited expenditures by a political party for such 'issue-advocacy' ads. By the end of the race, we had spent almost thirty-five million dollars on issue-advocacy ads (in addition to about fifty million dollars on conventional candidate-oriented media), burying the Republican proposals and building a national consensus in support of the president on key issues.'

Magleby [8] Expert Report at 11 (quoting Dick Morris, Behind the Oval Office: Getting Reelected Against All Odds 141, 624 (1999)) [DEV 4-Tab 8]. 'The national Democratic party managed to finance two-thirds of its pro-Clinton 'issue ad' television blitz by taking advantage of the more favorable allocation methods available to state parties. They simply transferred the requisite mix of hard and soft dollars to party committees in the states they targeted and had the state committees place the ads.' Mann Expert Report at 22 [DEV 1-Tab 1]; *see also* La Raja Cross Exam. Ex. 3 at 14, 37-48 [JDT 15] (discussing the emergence of 'party soft money'); Finding ¶ 1.26.1 (discussing allocation regime).

1.7 Experts for both sides agree that '[i]t did not take the Republican party long to respond in kind by promoting Bob Dole and Jack Kemp.' Magleby Expert Report at 11 [DEV 4-Tab 8]; *see also* La Raja Cross Exam. Ex. 3 at 46 [JDT Vol. 15] ('The Dole-Kemp campaign responded to the Morris plan with its own party- based media strategy.').

> In May of 1996, the Republican National Committee announced a $20 million 'issue advocacy' advertising campaign. Its purpose, in the words of the chairman, would be 'to show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country, so we can engage full-time in one of the most consequential elections in our history.' These presidential candidate-specific ads, like the Democratic ones, were targeted on key battleground states and financed with a mix of hard and (mostly) soft money. Both parties were now financing a significant part of the campaigns of their presidential candidates outside of the strictures of the FECA and well beyond the bounds of the 1979 FEC ruling that national parties may raise corporate and union funds and solicit

[8] David Magleby is an expert for Defendants.

> unlimited donations from individuals 'for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office.'

Mann Expert Report at 20 (citation omitted) [DEV 1-Tab 1]; *see also infra* Findings ¶ 1.20.1 (Republican consultants' discussion about whether such advertisements met the 'issue advocacy test').

1.8 This approach for the use of nonfederal funds spilled over into congressional races. Mann Expert Report at 20 [DEV 1-Tab 1]; *see also* Lamson [9] Decl. ¶ 9 (describing both parties' national committees' use of nonfederal money to run advertisements in a race for Congress in Montana). 1.9 By the end of the 2000 election cycle, it was clear that although '[s]cholars might differ about how best to change the campaign finance system, . . . they could not avoid the conclusion that party soft money and electioneering in the guise of issue advocacy had rendered the FECA regime largely ineffectual.' Mann Expert Report at 26.

[9] Since January 2001, Joe Lamson has served as the Communications Director for the Office of Public Instruction of the State of Montana, a post he also held from early 1997 until January 2000. During 2000, Lamson managed Nancy Keenan's campaign to represent Montana's Congressional district. During 1996, Lamson managed Bill Yellowtail's campaign to represent Montana's Congressional district. From 1983 through 1996, Lamson served as the state director for United States Representative Pat Williams' Congressional office in Montana. During this same period, Lamson also managed Congressman Williams' election campaigns in Montana. From 1981 to 1983, Lamson was Executive Director of the Montana Democratic Party. Lamson provided a sworn declaration in *Colorado Republican Fed. Campaign Comm. v. FEC*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001). Lamson Decl. ¶¶ 2-3 [DEV 7-Tab 26].

The Rise of Nonfederal Money Is Not Related to 'Party Building'

1.10 'The parties' expanding use of soft money for the promotion or attack of particular candidates . . . . [runs] counter to the stated purposes of soft money which were to permit parties to raise unlimited amounts of money for 'party building' purposes, unlike hard money which is subject to the contribution limits given to the parties to help elect or defeat candidates.' Magleby Expert Report at 11 [DEV 4-Tab 8]. Magleby notes that '[t]he content of such ads does nothing to foster party infrastructure. Those who make the ads and manage the campaigns are consultants, who often do not even reside in the state where the election is taking place.' Magleby Expert Report at 49 [DEV 4-Tab 8]. Plaintiffs' expert La Raja concurs, finding that the political parties 'exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building.' La Raja Cross Exam. Ex. 3 at 74-75; *see also* La Raja Cross Exam. at 67 [JDT Vol. 15] (finding that 'more non-federal funds in the allocation accounts are used for media rather than what I call party building').

1.11 As former Senator Brock[10] attests, nonfederal money

> by and large is not used for 'party building.' To the contrary, the parties by and large use the money to help elect federal candidates—in the Presidential campaigns and in close Senate and House elections. Far from reinvigorating the parties, soft money has simply strengthened certain candidates and a few large donors,

[10] Senator William Brock he served as United States Representative from Tennessee from 1963 until 1971. From 1971 until 1977, he served as a United States Senator from the State of Tennessee. From 1977 until 1981, he served as Chairman of the Republican National Committee. Brock Decl. ¶ 2 [DEV 6- Tab13].

> while distracting parties from traditional and important grassroots work.

Brock Decl. ¶ 6 [DEV 6-Tab 9]; *see also* Boren[11] Decl. ¶ 4 [DEV 6-Tab 8] ('[S]oft money is not used purely for 'party building' activities'); Buttenwieser[12] Decl. ¶ 15 [DEV 6-Tab 11] (explaining that there is little difference between federal and nonfederal money beyond the source and amount limitations on federal money, because national and state political parties use nonfederal money to influence federal elections).

National Party 'Issue Advocacy' Campaigns Funded With Nonfederal Money

1.12 As the experts for both parties note, the rise in non-federal money fundraising was spurred by the new-found ability to run 'issue advertisements' designed to affect federal elections.

1.13 Witnesses involved in the political process all agree that political party 'issue advocacy' includes communications, paid for in whole or part with nonfederal money, that attack or support a candidate by name while claiming to be an issue discussion outside the reach of federal election laws and do

[11] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

[12] Peter Buttenwieser is a large contributor to the Democratic Party. He estimates that from the 1996 election cycle through the 2002 cycle, he has donated over $2.8 million in non-federal funds to national committees of the Democratic Party, including over $1.2 million in the 2000 election cycle. Also from the 1996 election cycle through the current cycle, he estimates that he and his wife have contributed approximately $100,000 per cycle in federal funds to federal candidate committees and other federal political committees not affiliated with political parties. During this same period, he has also hosted many hard money fundraising events for federal candidates in Philadelphia. Buttenwieser Decl. ¶ 6 [DEV 6-Tab 11].

not use the *Buckley* express advocacy language referred to as 'magic words.'[13]

Members of Congress and candidates for federal office agree that political party advertisements paid for with nonfederal funds often influence elections. *See* 146 Cong. Rec. H428 (Feb. 15, 2000) (Rep. Ganske) (noting that parties in the 1996 election cycle 'took . . . [nonfederal] money and they did not use it to just go out and get a voter registration guide, they used that money for issue ads on TV that were nothing less than full campaign attack ads. Independent surveys have shown that 80 percent of those, quote, issue ads were actually attack ads.'); Shays Decl. in *RNC* ¶¶ 7, 8 [DEV 68-Tab 40] ('The political parties ... use these [nonfederal] funds not for general party-building activities, but instead on television advertisements that are designed to influence the outcome of federal elections (and are often indistinguishable from candidate-sponsored campaign ads.'); Meehan Decl. in *RNC* ¶ 13 [DEV 68-Tab 30] ('I believe that 'issue ads' by party committees are designed to and do affect the outcomes of elections, that they defeat candidates, and that they drive up the costs of elections.'); Rudman[14] Decl. ¶ 12 [DEV 8-Tab 34] ('The parties use soft money to help federal candidates get elected by running so-called 'issue ads' funded with soft money in closely contested federal races.'); McCain Decl. ¶¶ 15, 17 (describing political party advertising demonstrating that political 'parties circumvent federal contribution and spending limits by running candidate ads under the guise of 'issue advocacy.''); Chapin[15] Decl. ¶ 11

[13] *See Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

[14] Senator Warren Rudman was elected to the United States Senate from New Hampshire in 1980 where he served two terms. Rudman Decl. ¶¶ 1, 3 [DEV 8-Tab 34].

[15] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12] received about 49% of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four-year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* In recognition of Chapin's work as County Chairman, she received a Public Service Excellence Award from then- President Bill Clinton in 1997, and an Alumni Achievement Award from the Kennedy School of Government at Harvard University in 1999. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

[DEV 6-Tab 12] (stating that the National Republican Campaign Committee ('NRCC') ran television advertisements during her 2000 Congressional campaign designed to influence the result of the election); Bloom Decl. ¶ 10 [DEV 6-Tab 7].

Political consultants agree as well. *See* Beckett[16] Decl. ¶ 11 ('The NRCC itself ran television ads in the 2000 Congressional campaign . . . . which as I recall were run in the two months prior to the general election . . . . [which]

[16] Terry S. Beckett is a Democratic political consultant who has spent about 25 years working on political campaigns. Beckett Decl. ¶ 2 [DEV 6-Tab 3]. Beckett worked on the 1976 and 1980 Presidential campaigns of Jimmy Carter, the 1978 Bill Nelson Congressional campaign, and she ran Dick Batchelor's 1982 Congressional campaign. *Id.* Beckett also endeavored to establish a House Democratic Caucus within the Alabama legislature in the mid 1980's. *Id.* Beckett ran Gary Hart's 1988 Presidential campaign in Florida and Louisiana, and Dick Gephardt's 1988 Presidential campaign in Florida. *Id.* In 1986, Beckett did the polling on Linda Chapin's campaign for Orange County (Florida) Commissioner, and ran Chapin's 1990 and 1994 campaigns for Orange County Chairman. *Id.* Beckett also served as general consultant on Ms. Chapin's 2000 campaign to represent Florida's Eighth Congressional district, overseeing the work of the campaign manager and the media and polling consultants. *Id.* Beckett has also been involved in government having worked on the Executive Staff for Bob Graham from 1981-82 when he was the Governor of Florida and also serving as Ms. Chapin's Chief of Staff from 1991 to 1994 when she was County Chairman. *Id.* In addition, Beckett worked for a polling firm during the 1980s. *Id.*

were clearly intended to influence the election result.') & Ex. 3 (storyboards of two of these advertisements) [DEV 6-Tab 3]; *id.* ¶ 9 (describing Democratic Congressional Campaign Committee ('DCCC') efforts during the same election); Lamson Decl. ¶¶ 9, 17, Ex. 2-4 [DEV 7-Tab 26] (noting that political parties ran 'issue ads' designed to influence the outcome of the Montana Congressional election in both 1996 and 2000); Pennington[17] Decl. ¶ 10-11, 13-15 [DEV 8-Tab 31] (discussing how parties can and have used issue advocacy to affect federal elections). The DNC's political director also concurs. Stoltz[18] Decl. ¶ 16 [DEV 9-Tab 39] ('In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its

[17] Rocky Pennington is a Republican political consultant. Pennington Decl. ¶ 2 [DEV 8-Tab 31]. He is the owner and President of three Florida companies engaged in political activities: Southern Campaign Resources, Direct Mail Systems, Inc., and Summit Communications. *Id.* Southern Campaign Resources, which Pennington founded in 1982, does general consulting primarily for Florida state campaigns, but has also done Congressional races in Florida, including Congressman Cliff Steams' first race in 1988 in Ocala, Bill Sublette's 2000 campaign in the Eighth Congressional district, and Congressman Jeff Miller's 2001 special election in the Panhandle. *Id.* Direct Mail Systems, founded in 1981, is a direct mail company with roughly 100 employees that has done fundraising and has sent voter contact mail for candidates, parties and interest groups in Florida and elsewhere. *Id.* Direct Mail Systems has also sent voter contact mail for some of Florida's Republican Congressional delegation, as well as for state Republican parties in many other states. Finally, Summit Communications, which Pennington founded in 2000, creates political advertising for television and radio and buys airtime for various campaigns, such as Congressman Miller's 2001 general election campaign. *Id.*

[18] Gail Stoltz has been employed as the Political Director of the DNC since May 2001. From 1998 through 2001, she worked for the Service Employees International Union as Government Affairs Director. Prior to this she worked as Political Director for the Democratic Senatorial Campaign Committee ('DSCC') and in various capacities for the Democratic National Committee ('DNC'). Stoltz Decl. ¶ 1.

candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.').

In addition, experts for both sides agree that these 'issue ads' are intended to and do support the campaigns of federal candidates. *See* La Raja Cross Exam. Ex. 3 at 15 [JDT Vol. 15], 101-04; Magleby Expert Report at 40-42 [DEV 4-Tab 8].

Characteristics of National Party Nonfederal Campaign Advertisements

1.14 Many national political party committee 'issue ads' have focused on the positions, past actions, or general character traits of federal candidates, as part of efforts to influence federal elections.

Scripts of these advertisements confirm this. *See, e.g.*, ODP0021-01393 [DEV 70-Tab 48] (Republican National Committee's ('RNC') advertisement titled 'Pledge,' discussed *infra* Findings ¶ 1.20.2; ODP0023-02288 to 95 [DEV 70-Tab 48] (sample scripts of 'Keep More' with different sponsors identified (*i.e.* RNC, CRP, '[state party name]'). Some versions of the advertisement end with '[Member Name] kept his promise and voted for the middle-class tax cut. Clinton vetoed it,' while others end with 'Congressman [____] voted for the largest tax increase in American history . . . and against Republican efforts to roll it back.'); ODP0023-02308 [DEV 70-Tab 48] (national political party advertisement titled 'Fool Me Once,' beginning with the line 'Compare the Clinton rhetoric with the Clinton record,' discussing statements President Clinton made and actions on the same issues, and concluding with the line 'Tell President Clinton you won't be fooled again.'); ODP0023-02313 [DEV 70-Tab 48] (RNC advertisement titled 'Stripes,' which states in part: 'Bill Clinton . . . He's really something. He's now trying to avoid a sexual harassment lawsuit claiming he is on active military duty . . . . Active Duty? Bill

Clinton . . . He's really something.'); ODP0023-02314 [DEV 70-Tab 48] (script of the RNC's 'The Story,' discussed *supra* Finding ¶ 1.20.1); ODP0023-02326 (national political party advertisement titled 'More,' stating that 'Under President Clinton, spending on illegal[] [immigrants] has gone up. While wages for the typical worker have gone down . . . . Tell President Clinton to stop giving benefits to illegals, and end wasteful Washington spending.'); ODP0023-02389-92 [DEV 70-Tab 48] (three versions of a national political party advertisement titled 'Control' stating that 'Washington labor bosses and liberal special interest groups want to buy control of Congress,' and explaining why these groups think a named candidate 'will vote their way . . . to return to higher taxes and more wasteful spending'); ODP0029-00010-25 [DEV 70-Tab 48] (national political party advertisement titled 'High Taxes' and related documents. 'High Taxes' states that a Congressional candidate while 'in the state legislature . . . voted to raise corporate and personal income tax rates almost 18 percent. He even supports raising social security tax limits.'); ODP0029-00031 [DEV 70-Tab 48] (national political party advertisement titled 'Family Budget,' stating that a Congressional candidate raised taxes while in state and local government, and concluding: 'If you think *your* family pays *enough* in taxes . . . Call [_____]. Tell her to stop raising your taxes.') (emphasis in original); ODP0029-00041 [DEV 70-Tab 48] (national congressional committee advertisement supporting a candidate who 'knows you have better things to do with your money than pay higher taxes'); *see also* ODP0029-00114 [DEV 70-Tab 48]; ODP0029-00169 [DEV 71-Tab 48]; ODP0029-00177 to 79 [DEV 71-Tab 48]; ODP0029-00235 to 37 [DEV 71-Tab 48]; ODP0029-00329 [DEV 71-Tab 48]; ODP0029-00339 [DEV 71-Tab 48]; ODP0041-00177 to 78 [DEV 71-Tab 48]; ODP0041-00202 to 06 [DEV 71-Tab 48]; ODP0041-00220 to 23 [DEV 71-Tab 48]; ODP0041-00280 to 82 [DEV 71-Tab 48]; ODP0041-00352 to 54 [DEV 71-Tab 48]; ODP0041-01261 [DEV 71-

Tab 48]; ODP0041- 01275 [DEV 71-Tab 48]; ODP0029-00138 to 47 [DEV 71-Tab 48]; ODP0036-01403 to 06 [DEV 71-Tab 48]; ODP0036-02931-32 [DEV 71-Tab 48]; ODP0041-00269-71 [DEV 71- Tab 48]; ODP0041-01024 to 27 [DEV 71-Tab 48]; ODP0041-01219 [DEV 71-Tab 48] (other political party advertisements that focus on the positions, past actions, or general character traits of federal candidates, and related documents).

1.15 Many political party committee 'issue ads' have compared the positions or past actions of competing federal candidates, portraying one position negatively and the other positively, as part of efforts to influence federal elections. Scripts provided to the Court confirm this fact. *See, e.g.*, ODP0023- 02387 [DEV 70-Tab 48] (national political party advertisement comparing candidate positions on issues, stating that 'Congressman [_____] voted for our plan to give families a $500 per child tax credit. . . . [Opponent] voted for Jim Florio's $2.8 billion tax increase which increased your income, sales and gas taxes.'); ODP0029-00149 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'support[s] the $500 per child tax credit and ending the tax penalty on married couples,' while the other 'voted against' those ideas); ODP0029-00159 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'wants Washington *bureaucrats* to decide what's right for our kids,' while the other 'supports local school control') (emphasis in original); ODP0041-00585-86 [DEV 71-Tab 48] (national congressional campaign committee advertisement stating that one candidate 'supports a program' that 'spends millions to hire more bureaucrats,' while the other 'supports proposals that spend less on bureaucrats and more on local schools'); ODP0041-00729-32 [DEV 71-Tab 48] (national political party advertisement stating that one candidate supports a welfare program that 'is restoring responsibility, pride and self-worth,' while the other 'voted *against* moving able-bodied welfare recipients from welfare

to work') (emphasis in original); ODP0041-01152 [DEV 71-Tab 48] (national political party advertisement stating that one candidate 'doesn't support tax cuts for Idaho working families,' while the other 'has a different view'); ODP0041-01177 [DEV 71-Tab 48] (national political party advertisement stating that one candidate was 'the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood,' while the other 'supports laws that protect our children and keep violent criminals in jail for their full terms'); ODP0041-01189 [DEV 71-Tab 48] (national political party advertisement stating that one candidate voted against a measure to 'abolish the tax code to force meaningful reform,' while the other 'wants to abolish the tax code, so we can create a tax code that is fairer and simpler for working families'); ODP0041-01198 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'supports tax cuts for working families,' while the other 'voted against billions worth of tax cuts for working families'); ODP0041-01266 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'pushed for tax increases' while the other 'knows lower taxes and responsible government spending are better policies'); ODP0041-01337 [DEV 71-Tab 48] (national political party advertisement noting that one candidate 'supports Senator Kennedy's ultra liberal plan to mandate spending increases of 25 billion dollars over the next five years,' while the other 'supports lower taxes').

1.16 Political parties aim their nonfederal money largely at competitive races. The political party committees spend millions of nonfederal dollars in competitive U.S. Senate races and hundreds of thousands of dollars or more in competitive U.S. House races. Magleby Report at 39 [DEV 4-Tab 8]. *See also* McConnell Dep. at 237 [JDT Vol. 19] ('I think every Senator realizes that the resources of the National Republican Senatorial Committee ['NRSC'] are going to be deployed to the . . . maximum extent in places

where there are competitive races'); Bumpers[19] Decl. ¶ 4 [DEV 6-Tab 10] ('Party committees focus their resources on competitive races.'); McCain Decl. ¶ 22 [DEV 8-Tab 29] ('[P]arties generally focus their soft money spending first on taking care of the parties' current officeholdersand on the candidates running for open seats and after that on the challengers running against incumbents').

1.16.1 For example, television and radio electioneering advertising by political parties played an important role in the 2000 Congressional elections in Florida's Eighth District, 'a very close open-seat race.' Beckett Decl. ¶¶ 4, 9 [DEV 6-Tab 3] (noting that the winning candidate garnered 51% of the vote). Political parties on both sides of these campaigns ran so-called 'issue ads' that were financed partly with nonfederal money but clearly directed at influencing the outcome of the election. The DCCC ran television advertising praising Linda Chapin, the Democratic candidate, or criticizing the Republican candidates, through the Democratic State Party in order to take advantage of the more favorable hard money-soft money allocation ratios enjoyed by state parties.[20]

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[19] Senator Dale Bumpers served two terms as Governor of Arkansas, from 1971 to 1975. Bumpers Decl. ¶ 2 [DEV 6-Tab 10]. After his time as Governor, Bumpers served as a Member of the United States Senate, representing the State of Arkansas, from 1975 to 1999. *Id.* After he retired from the Senate, Senator Bumpers spent one year directing the Center for Defense Information, a nonprofit think-tank based in Washington, D.C. *Id.* He currently practices law in Washington D.C. at the law firm Arent Fox Kintner Plotkin & Kahn, PLLC. *Id.* ¶ 3.

[20] One advertisement run during the final 60 days of the election campaign, paid for by the DCCC through the Florida Democratic Party, attacked Chapin's challenger, stating the following:

> Announcer: 'I'm pro-gun.' That's how he described himself to the Orlando Sentinel. Pro-gun. He wants to get rid of the Brady Bill, the common-sense law that says we should just wait 5 days before purchasing a handgun. Pro-gun. He even opposes mandatory trigger locks to keep children safe from harm. 'I'm pro-gun.' He's Ric

Beckett Decl. ¶ 9, Ex. 1 [DEV 6-Tab 3]; Chapin Decl. ¶ 9 [DEV 6-Tab 12]; *see also* Bloom Decl. ¶ 10, Ex. 1-1, 1-4, (describing a similar situation for the 2000 election campaign in Florida's 22nd Congressional District) [DEV 6-Tab 7]. The NRCC and the Florida Republican Party also ran television advertisements in the two months prior to the general election, most of which criticized Chapin's record or positions, and which witnesses testify were clearly intended to influence the election results.[21] Chapin Decl. ¶ 10, Ex. 2 [DEV 6-Tab 12]; Beckett Decl. ¶ 10, Ex. 2 [DEV 6-Tab 3]; Pennington Decl. ¶ 14, Ex. 3 [DEV 8-Tab 31]; *see also* Bloom[22] Decl. ¶ 11, Ex. 2 (Republican party ads in 2000 Florida 22nd District Congressional race) [DEV 6-Tab 7].

Keller, and you should tell him to support sensible gun safety for change.

Chapin Decl. ¶ 9 & Ex. 1-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 9-DEV 6-Tab 3].

[21] One advertisement paid for by the NRCC ran within 60 days of the election and stated the following: Announcer: It was Tyson vs. McNeeley, the fight shown on Pay-Per-View, bought and paid for by the county jail system. Linda Chapin's county commission ran the jail system that paid for Cable TV for convicts at [its] work-release center. Under Chapin, Convicts also got new TVs and VCRs. The Sentinel wrote cells are carpeted. The day room has padded furniture, such is life for hundreds of Orange County Jail prisoners. Ask Chapin why convicts got Cable TV.

Chapin Decl. ¶ 11 & Ex. 3-2 [DEV 6-Tab 12]; Beckett Decl. ¶ 11; Pennington Decl. ¶ 14.

[22] Elaine Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional district, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id.* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami

1.16.2

> Most interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position. In political science, there is strong empirical support for the theory that interest groups allocate resources primarily to pursue the 'access' strategy, meaning they give to candidates who are most likely to win office, which is usually the incumbents (see, for example, Hermson 2000). Political parties, however, allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election.

La Raja Expert Report ¶ 14 [RNC Vol. VII].

1.17 'Almost 92% of party ads in the 2000 election never even identified the name of a political party, let alone encouraged voters to register with the party, to volunteer with the local party organization, or to support the party.' *Buying Time 2000* at 64 [DEV 46]. Defense Expert Magleby concurs, finding 'only 15 percent of the ads in 1998 and 7 percent of the ads in 2000 mentioned the party by name in the ad, except in the tag line indicating which party committee paid for the ad.' Magleby Expert Report at 49 [DEV 4-Tab 8].

1.18 Out of the estimated $25.6 million spent by political parties on advertisements in the 1998 election cycle, $24.6 million went to fund advertisements that referred to a federal candidate. *See* Krasno & Sorauf[23] Expert Report at Table 1. Out of 44,485 commercials, 42,599 referred to a federal

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Beach and Miami). *Id.* Bloom was Speaker Pro- Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

[23] Jonathan Krasno and Frank Sorauf are experts for Defendants.

candidate. *Id.* Viewers perceived 94 percent of these advertisements as electioneering in nature. *Id.* at Table 7.

1.19 Plaintiffs' own experts and witnesses testify that '[i]ssue advertising outside the context of electioneering by political parties is rare.' RNC expert Nelson Polsby Dep. in *RNC v. FEC*, 98-CV-1207 (D.D.C) (hereinafter '*RNC*') Ex. 3, at 5 [DEV 66-Tab 5]. In this case, the Plaintiffs' expert, Professor Raymond La Raja, acknowledges that 'issue advertisements' are intended to and do support the campaigns of federal candidates. La Raja Cross Exam. Ex. 3 at 14-15 [JDT Vol. 15] ('[I]ssue ads, however, have been designed with the intent of boosting the campaigns of targeted candidates. . . . Rather than use soft money to shore up weak state and local organizations, or enforce party discipline in government, parties invest primarily in issue ads that help candidates.') [JDT Vol. 15]; La Raja Decl. ¶ 16(b) [RNC Vol. VII] ('Political parties use nonfederal money to develop and disseminate political messages.'). RNC political operations director Terry Nelson[24] testifies that the RNC engages in 'issue advocacy in order to achieve one of our primary objectives, which is to get more Republicans elected.' Nelson Dep. at 191 [JDT Vol. 24]. This conclusion is echoed by Defense Expert Magleby. Magleby Expert Report at 45 [DEV 4-Tab 8] ('The content, tactics and strategy [of political party advertisements] are generally indistinguishable from the candidate campaigns, except that party campaign communications are generally more negative in tone.')

1.19.1 An RNC official provides examples of advertisement campaigns he claims the RNC ran for 'the exclusive purpose of influencing the legislative and policy debate.' Josefiak [25]

[24] Terry Nelson is the RNC's Deputy Chief of Staff and Executive Director of Political Operations. Nelson Dep. at 8-9 [JDT Vol. 24]

[25] Thomas Josefiak is Chief Counsel of the RNC. Josefiak Decl. ¶ 1 [RNC Vol. I].

Decl. ¶ 91 [RNC Vol. I]. These campaigns dealt with the issues of the balanced budget amendment, welfare reform, and education. *Id.* One of these advertisements' purpose

> was to communicate the Republican Party's position that the federal government must control its reckless appetite for deficit spending. This particular advertisement featured President Clinton, and included numerous clips of him stating a different number of years in which he would balance the budget. The advertisement explained, 'Talk is cheap. Double talk is expensive. Tell Mr. Clinton to support the Balanced Budget Amendment.

Id ¶ 91(c). Josefiak calls this advertisement 'one of the most memorable and effective broadcast advertisements in [RNC] history.' *Id.* This commercial was run in May 1996, *id.*, the same time the RNC was running very similar so-called 'issue advertisements' attacking President Clinton as part of an effort to assist the Dole presidential campaign which was low on funds, *see infra* Findings ¶ 1.20. RNC advertisements addressing welfare reform were also run in the summer of 1996, 'comparing Clinton's rhetoric on welfare reform with his record on welfare reform.' Josefiak Decl. ¶ 91(d)[RNC Vol. I]. Comparing President Clinton's statements with his record was a major theme of RNC advertisements run during this period in aid of the Dole campaign. *See infra* Findings ¶¶ 1.20, 1.20.2. Another RNC advertisement ran in October 2002, the month before a federal election, 'nationwide in support of the Republican Party's education agenda,' and had the following script:

> Male: Every child can learn . . .
>
> Female: . . . and deserves a quality education in a safe school.
>
> Male: But some people say some children can't learn . . .

Female: . . . so just shuffle them through.

Male: That's not fair.

Female: That's not right.

Male: Things are changing. A new federal law says every child deserves to learn.

Female: It says test every child to make sure they're learning and give them extra help if they're not.

Male: Hold schools accountable. Because no child should be in a school that will not teach and will not change.

Female: The law says every child must be taught to read by the 3rd grade. Because reading is a new civil right.

Male: President Bush's No Child Left Behind Law.

Female: The biggest education reform and biggest increase in education funding in 25 years. Male: Republicans are working for better, safer schools ...

Female: . . . so no child is left behind.

Male: That's right . . . Republicans.

Announcer: Learn how Republican education reforms can help your children. Call 1-800-843-7620. Help President Bush and leave No Child Behind.

Paid for by the Republican National Committee.

Josefiak Decl. ¶ 91(e) & RNC Ex. 2428 [RNC Vol. I]. The decision by the RNC to run this advertisement, about legislation that had already passed, within one month of a federal election raises questions about whether promoting education policy was the only goal of this advertisement.

These presumably are the best examples the RNC had of its 'genuine issue advocacy.' I find that two of these

commercials, when viewed in context, clearly had an electioneering purpose in addition to any policy goal. The third, concerning education, may also have sought to promote Republican candidates. These examples reinforce the determination of the RNC's own experts: genuine issue advocacy on the part of political parties is a rare occurrence. *See supra* Findings ¶ 1.19.

1.20 Political parties also engage in 'issue advocacy' to help their candidates whose campaigns are low on funds. For example, the RNC spent $20 million on issue advertisements from March 18, 1996, through the Republican National Convention in August, designed to boost Senator Dole's image at a time when he had virtually run out of federal matching primary funds. The RNC paid for a portion of these issue advertisements with nonfederal funds, including the costs of creating and/or disseminating advertisements that attacked President Clinton's record on welfare reform, taxes, and budgetary policy. Thompson Comm. Report at 4014-16, 7520, 8294; Annenberg Report 1997 at 66; Huyck[26] Decl. in *Mariani v. United States*, 3: CV-1701 (M.D. Pa) (hereinafter *Mariani*) ¶¶ 3, 5 [DEV 79-Tab 60]; *see also* Huyck Decl. in *Mariani* Attach. A [DEV Supp.-Tab 9] (text of advertisements paid for by the RNC and other Republican party committees in part with nonfederal money).

The RNC conducted a detailed analysis of several advertisements it was planning to run in various markets. The advertisements consisted of two themes: build up then-Senator and Republican presidential candidate Bob Dole, and attack President Bill Clinton. These advertisements were tested in focus groups to see the effect they had on undecided voters. The advertisement used to build up Senator Dole told

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[26] Pat Huyck was the RNC's Director of Accounting as of 1999. Huyck Decl. in *Mariani v. United States*, 3: CV-1701 (M.D. Pa) ¶¶ 3, 5 [DEV 79-Tab 60].

his life story and never mentioned the words 'vote for,' 'elect,' or any of the 'magic words' of express advocacy. The second set of advertisements showed President Clinton speaking on a certain issue, then publicly stating the opposite. All of the commercials were tested to see which would give help Senator Dole and hurt President Clinton in the polls. Memorandum to Haley Barbour from Charlie Nave and Joel Mincey, dated May 28, 1996, FEC MUR 4553, Fabrizio Dep. Ex. 5 [DEV 55-Tab 113] (INT011830); FEC MUR 4553, Fabrizio Dep. at 83-94 [DEV 55-Tab 113] (despite working as a consultant for Senator Dole, Fabrizio McLaughlin and Associates were sharing their data with the RNC, NRSC, and NRCC).

1.20.1 One example from this effort is 'The Story':

> Audio of Bob Dole: We have a moral obligation to give our children an America with the opportunity and values of the nation we grew up in.
>
> Voice Over: Bob Dole grew up in Russell, Kansas. From his parents he learned the value of hard work, honesty and responsibility. So when his country called ... he answered. He was seriously wounded in combat. Paralyzed, he underwent nine operations.
>
> Audio of Bob Dole: I went around looking for a miracle that would make me whole again.
>
> Voice Over: The doctors said he'd never walk again. But after 39 months, he proved them wrong.
>
> Audio of Elizabeth Dole: He persevered, he never gave up. He fought his way back from total paralysis.
>
> Voice Over: Like many Americans, his life experience and values serve as a strong moral compass. The principle of work to replace welfare. The principle of accountability to strengthen our criminal justice system.

> The principle of discipline to end wasteful Washington spending.
>
> Voice of Bob Dole: It all comes down to values. What you believe in. What you sacrifice for. And what you stand for.

Fabrizio Dep. Ex. 2; McCain Decl. ¶ 15. The RNC paid for 'The Story,' in part with nonfederal money, and it was intended to help Senator Dole in the Presidential election. Huyck Decl. in *Mariani* ¶ 3 [DEV 79-Tab 60]; FEC MUR 4553, Fabrizio Dep. at 50 [DEV 55-113]; McCain Decl. ¶ 15 [DEV 8-Tab 29].

The RNC's Curt Anderson and Wes Anderson wrote to the RNC Chairman regarding the Dole 'Story' advertisement, stating: 'We could run into a real snag with the Dole Story spot. Certainly, all the quantitative and qualitative research strongly suggests that this spot needs to be run. Making this spot pass the issue advocacy test may take some doing.' ODP0025-02018-20 [DEV 70-Tab 48]. Senator Levin commented: '[a]ny reasonable person looking at that ad at that particular time in the Presidential season would say: It's not an ad about welfare or wasteful spending; it is an ad about why should we elect that particular nominee.' 145 Cong. Rec. S12747 (1999) (Sen. Levin). Senator Dole himself stated that 'The Story' 'never says I'm running for President. I hope that it's fairly obvious since I'm the only one in the picture.' Center for Responsive Politics, A Bag of Tricks: Loopholes in the Campaign Finance System (1996) at 13, ODP0018-00172 [DEV 69-Tab 48].

1.20.2 Another example from the RNC's 1996 issue advocacy campaign is 'Pledge'

> Clinton: I will not raise taxes on the middle class.
>
> Announcer: We heard this a lot.

> Clinton: We gotta give middle class tax relief, no matter what else we do.
>
> Announcer: Six months later, he gave us the largest tax increase in history. Higher income taxes, income taxes on social security benefits, more payroll taxes. Under Clinton, the typical American family now pays over $1,500 more in federal taxes. A big price to pay for his broken promises. Tell President Clinton: You can't afford higher taxes for more wasteful spending.

Annenberg Report 1997 at 66; *see also* Huyck Decl. in *Mariani* ¶¶ 3 & Attach. A [DEV 79-Tab 60].

1.21 The political parties understand that their issue advocacy campaigns affect federal elections, and they sponsor them with that purpose. This fact is evident from the 1998 'Operation Breakout' issue advocacy campaign mounted by the NRCC in cooperation with the RNC. 'Operation Breakout' was touted as an effort to 'ensure that the [Republican] party not only maintains, but expands our majorities in Congress.' ODP0031-00299 [DEV 71-Tab 48] (September 25, 1998, letter from RNC Chair Nicholson to donor thanking him for his donation to 'Operation Breakout'); *see also* ODP0033-00534 [DEV 71-Tab 48] (RNC Solicitation letter for 'Operation Breakout,' describing it as an effort to 'hold onto our majority in the House').

1.22 The nature of the political parties' issue advertisements, detailed *supra*, demonstrates what any observer of politics has come to know: political party 'issue advocacy' campaigns are targeted at federal elections, particularly competitive races, and are intended to, and do affect the outcome of those contests.

National Parties Expend A Large Proportion of their Nonfederal Funds for 'Issue Advocacy'

1.23 The national political parties spend a large proportion of their budgets on 'issue advertisements' that are designed to

help elect federal officeholders and candidates. In 2000, for example, the RNC spent an estimated $70-75 million dollars on the production and broadcasting of television and radio advertisements, including both issue advocacy and coordinated expenditures. Oliver[27] Dep. at 148-49 [DEV Supp.-Tab 1]. *Id.* 'During the 2000 presidential election year, the largest single portion of the DNC budget was used for issue advertising.' Marshall Decl. ¶ 3 [DEV 8-Tab 28].

1.24 Defense expert David Magleby's study estimates that 'over half, and sometimes as much as three-quarters, of soft money expenditures go to broadcast advertising.' Magleby Expert Report at 49 [DEV 4-Tab 8].

1.25 As Defendants' expert Donald Green, relying on an article by Plaintiffs' expert La Raja, observes:

> [T]he original exemptions for soft-money were justified partly on the grounds that get-out-the-vote activity would help strengthen parties. As it happened, only a small fraction of the soft money (or hard money, for that matter) that flowed to state and national parties was spent on voter mobilization activity, even broadly conceived to include direct mail and commercial phone banking. According to the classification system presented by La Raja and Jarvis-Shean (2001, p.3), 8.5% of national party soft money expenditures went to 'mobilization' and 'grassroots.' The figures for state and local parties are each 15%.

D. Green Report at 14 n.17 [DEV 1-Tab 3] (citing Raymond La Raja and Elizabeth Jarvis-Shean, Assessing the Impact of a Ban on Soft Money: Party Soft Money Spending in the 2000 Elections. (Unpublished manuscript: Institute of Governmental Studies and Citizens' Research Foundation 2001).

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[27] John Oliver is Deputy Chairman of the RNC.

National Parties Funnel Nonfederal Funds Through State Parties for the Purchase of Advertisements Designed to Affect Federal Elections

1.26 The evidence clearly demonstrates that a large proportion of nonfederal funds transferred from the national to the state parties is targeted for the purchase of specific issue advertisements designed by the national parties. These advertisements are overwhelmingly intended to affect federal elections. This is done in large part because the state parties have better federal/nonfederal allocation ratios which allows such state-bought advertisements to be purchased with a greater proportion of nonfederal funds.

1.26.1 Defense expert Magleby explains how the FEC's allocation regime makes nonfederal fund transfers to the state parties attractive to the national parties.

> Parties can stretch their soft money even further by transferring soft and hard money to state parties where they can achieve a better ratio of soft to hard dollars than if they spent the money themselves. This is because the ratio of soft to hard dollars for party spending if done by the national patty committees is 35 percent soft and 65 percent hard for presidential years, and 40 percent soft and 60 percent hard for off years, but if done by state parties the ratio of soft to hard dollars is greater. The reason for this difference is state parties are allowed to calculate their soft/hard ratio based on the ratio of federal offices to all offices on the ballot in any given year. Both political parties have found spending soft money with its accompanying hard money match through their state parties to work smoothly, for the most part, and state officials readily acknowledge they are simply 'pass throughs' to the vendors providing the broadcast ads or direct mail.

Magleby Expert Report at 37 [DEV 4-Tab 8]. Other witnesses and evidence support this contention, which no one disputes.

See, e.g., Marshall Decl. ¶ 3 [DEV 8-Tab 28] (testifying that in 2000 the DNC transferred funds to the state parties to take advantage of their allocation rates); *see also* 11 C.F.R. § 106.5(b)(2)(i) (2001) (during presidential election years national party committees required to pay for their mixed activities with at least 65 percent in federal funds); *id.* at § 106.5(b)(2)(ii) (during nonpresidential election years national party committees required to pay for their mixed activities with at least 60 percent in federal funds).

1.26.2 The national political parties take advantage of this allocation regime when planning and executing their advertising budgets. One RNC memorandum contains a chart which

> clearly demonstrates what we already clearly know, that any media we place in the target presidential states should be placed through state parties. The average ballot allocation in the top 17 target states is 37% federal—63% non- federal, this obviously contrasts very well with our 65% federal—35% non- federal allocation.

RNC Memorandum dated March 18, 1996, titled 'Ballot Allocation of Target States' ODP0025-02720 to 21 [DEV 70-Tab 48]. The memorandum concludes that by using the state political parties, rather than directly making the purchase, the RNC would save $2.8 million in federal funds on a $10 million media buy. *Id. see also* ODP0021-1365 to 1367 [DEV 70-Tab 48] (memorandum from Haley Barbour to the California House Republicans, discussing the need to make a media buy in California and stating that '[t]o accomplish this buy, the [RNC] would transfer funds to the California Republican Party, which would actually buy the advertising. Under FEC regulations, the California Republican Party must pay for the advertising with one-third FEC contributions and two thirds nonfederal dollars'); McConnell Dep. at 267-77 [JDT Vol. 19] (stating that the NRSC prefers to transfer funds to state parties who then purchase NRSC advertisements with

a more favorable federal/nonfederal fund allocation ratio); Nelson Dep at 76-77 [JDT Vol. 24] (stating that purchasing political advertisements through state parties has two advantages: (1) better federal/nonfederal fund allocation ratios and (2) 'having [a] state disclaimer [on the advertisement] is generally better than having a national disclaimer on it'); Marshall Decl. ¶ 3 [DEV 8-Tab 28] (noting that in 2000, the largest single portion of the DNC budget was used for issue advertising, but that '[t]he DNC typically did not expend money for these issue ads itself, but instead transferred both federal and non-federal money to the state parties to make these expenditures'); ODP0023-02358 to 65 [DEV 70-Tab 48] (RNC tally of '1996 Media Buys,' listing advertisements purchased, price, and the amount of federal and RNSEC funds used); ODP0023-03560 to 660 [DEV 70-Tab 48] (RNC report of 1996 fund transfers to state parties used for 'party building/media buy'); ODP0025- 01560 [DEV 70-Tab 48] (memorandum from the Republican National Finance Committee dated May 24, 1996, titled 'California T.V. Money,' discussing the need to raise $4 million in nonfederal funds in two weeks which would then be transferred to the CRP in order to '*get on the air and stay on the air* for the next three months in CA') (emphasis in original); *supra* Findings ¶¶ 1.6 (in 1996 the DNC financed two-thirds of its Clinton presidential campaign issue advocacy through state party transfers), 1.4.3 (Mann) (over half of the nonfederal money raised by the national party committees was transferred to the state parties during the 2000 election cycle).

1.26.3 The national political party committees transferred $9,710,166 in federal funds to state political party committees during the 1992 election cycle, $9,577,985 during the 1994 election cycle, $49,967,893 during the 1996 election cycle, $30,475,897 during the 1998 election cycle, and $131,016,957 during the 2000 election cycle. The national political party committees transferred $18,646,162 in non-

federal funds to state political party committees during the 1992 election cycle, $18,442,749 during the 1994 election cycle, $113,738,373 during the 1996 election cycle, $69,031,644 during the 1998 election cycle, and $265,927,677 during the 2000 election cycle. Biersack[28] Decl. Tbls. 4, 8 [DEV 6-Tab 6].

1.26.4 State political parties use a large portion of the transferred nonfederal money to finance public communications that support or oppose a federal candidate. *See* Bowler[29] Decl. ¶ 15 (explaining that '[t]he majority of [national transfers to the CDP] were for issue advocacy'). According to Plaintiffs' expert La Raja, '[i]t appears that both parties . . . use soft money transfers primarily to execute national campaign strategy through state parties.' La Raja Cross Exam. Ex. 3 at 103 [JDT Vol. 15]. La Raja finds that 'more non-federal funds in the allocation accounts are used for media rather than what I call party building,' La Raja Cross Exam. at 67 [JDT Vol. 15] (La Raja's definition of 'party building' does not include administrative spending); La Raja Expert Report ¶ 22 [RNC Vol. VII] (finding that in 2000, 44 percent of transferred nonfederal funds were used for media expenditures and 30 percent for administrative overhead). La Raja concludes that 'state parties invest most soft money from the national parties in federal races,' but notes that 'these investments have considerable effects on races further down the ticket.' La Raja Cross Exam. Ex. 3 at 139 [JDT Vol. 15] (La Raja dissertation) [JDT Vol. 15]; *see*

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[28] Robert W Biersack served as the Supervisory Statistician for the FEC from 1983 to February 2002. As the Supervisory Statistician, he was responsible for evaluating the quality, reliability, and validity of information contained in the FEC disclosure databases. Currently, he is Deputy Press Officer for the FEC, a position he has held since February 2002. Biersack Decl. ¶ 1 [DEV 6-Tab 6].

[29] Kathleen Bowler is the Executive Director of the CDP. Bowler Decl. ¶ 1.

also La Raja Cross Exam. 17-18 (stating that he stands by the conclusions reached in his dissertation).

1.26.4.1 A good example of this system comes from the Republican Party of New Mexico ('RPNM'). A 1998 financial statement from the state party shows that it received revenues of $1,524,634 in nonfederal transfers from other Republican organizations, $1,110,987 in individual contributions, and just $389,552 in federal transfers from Republican organizations. The RPNM spent over one-third of its 1998 revenues, $1,062,095, on 'issue advocacy—television, radio and mail.' INT810-1605 to 12 (RNC NM0406326—33) [DEV 114].

1.26.5 These issue advertisements funded by nonfederal transferred funds are mainly intended to support federal candidates. Plaintiffs' expert La Raja notes that 'one of the goals' of national party allocation of nonfederal funds to state parties is to help federal candidates in close elections, and that his 'impression' is that it is their primary goal. La Raja Cross Exam. at 73-74 [JDT Vol. 15]; *see also* Magleby Expert Report at 39 ('[National party s]oft money is largely aimed at competitive [federal] races.'). La Raja finds that the parties 'are highly functional rather than responsible. Rather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money—to pursue the short-term goal of winning elections.' La Raja Cross Exam. Ex. 3 at 75 [JDT Vol. 15]; *see also id.* at 15 (stating that parties invest soft money primarily 'in issue ads that help candidates'). According to La Raja, the national parties' spending of nonfederal funds is proof that 'they are functional parties dedicated to winning elections.' *Id.* at 25; *see also* La Raja Cross Exam. Ex. 1 (La Raja Decl.) ¶ 11(a) ('American political parties have focused primarily on winning elections . . . .') [JDT Vol. 15].

1.26.6 Representatives of the Congressional committees acknowledge that fund transfers from their committees to state parties are used primarily for federal election advertising. *See* Jordan[30] Decl. ¶ 68 [DEV 7-Tab 21] ('In my experience, the large majority of the DSCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Democratic Senate candidates or their Republican opponents, while not expressly advocating any candidate's election or defeat.'); Vogel[31] Decl. ¶ 63 [DEV 9-Tab 41] ('In my experience, the large majority of the NRSC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. Frequently, these communications refer to Republican Senate candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat.'); McGahn[32] Decl. ¶ 55 [DEV 8-Tab 30] ('In my experience, the large majority of the NRCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue advocacy communications. . . . Frequently, these communications refer to Republican House candidates or their Democratic opponents, while not expressly advocating any candidate's election or defeat.'); Wolfson[33] Decl. ¶ 63 [DEV 9-Tab 44] ('In my experience, the large majority of the DCCC's nonfederal transfers to state and local party committees have been to support the nonfederal share of issue

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[30] James Jordan is the Executive Director of the DSCC. Jordan Decl. ¶ 1 [DEV 7-Tab 21].

[31] Alexander Vogel is General Counsel for the NRSC. Vogel Decl. ¶ 1 [DEV 9-Tab 41].

[32] Donald McGahn is General Counsel for the NRCC. McGahn Decl. ¶ 1 [DEV 8-Tab 30].

[33] Howard Wolfson is Executive Director of the DCCC. Wolfson Decl. ¶ 1 [DEV 9-Tab 44].

advocacy communications. Frequently, these communications refer to Democratic House candidates or their Republican opponents, while not expressly advocating any candidate's election or defeat.') *see also* La Raja Cross Exam. Ex. 3 at 69 (La Raja dissertation) [JDT Vol. 15] ('It would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations.').

1.26.7 Representatives of the congressional campaign committees also admit that they retain control over the advertisements their nonfederal money transfers are used to purchase. Jordan Decl. ¶¶ 72-73 [DEV 7-Tab 21] ('When the DSCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DSCC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DSCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DSCC counsel and DSCC senior employees.'); Vogel Decl. ¶ 67-68 [DEV 9-Tab 41] ('When the NRSC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with the state party and media consultants, who are generally retained by the state party at the request or suggestion of the NRSC, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRSC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by NRSC counsel and NRSC senior

employees.'); McGahn Decl. ¶¶ 58-59 ('When the NRCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with the state party and media consultants, and then provides the communications to the state party, together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The NRCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by me, as NRCC counsel, and NRCC senior employees.'); Wolfson Decl. ¶¶ 66-67 ('When the DCCC transfers funds to state party committees, including nonfederal funds, for the purpose of disseminating issue advocacy communications, it first develops the communications in consultation with media consultants, who are generally retained by the state party at the request or suggestion of the DCCC, and then provides the communications to the state party together with the necessary funds to distribute them locally. State parties may, but generally do not, reject the communications. . . . The DCCC does not permit issue advocacy communications it supports to be recorded or produced until they have been approved by DCCC counsel and DCCC senior employees.').

1.26.7.1 On September 28, 1998, NRSC Executive Director Steven Law wrote then-NRSC Chairman Senator Mitch McConnell recommending that the NRSC fund an issue ad playing off an article that appeared in Nevada's largest newspaper. Democratic Senatorial candidate Harry Reid 'got bad reviews for an over-the- top, hostile performance, suggesting a line of attack that builds on our six-month-long message that Harry Reid says one thing in Nevada and does the opposite in Washington. . . . If we went in this direction, I would suggest running this spot for one week at 1000 [gross ratings point], to be followed with our last ad in the Nevada issue advocacy campaign, on lawyers'

fees.' ODP0036-02931-32 [DEV 71-Tab 48]. Law's idea was later implemented in an advertisement paid for by the Republican State Central Committee of Nevada. ODP0036-01403 to 06 [DEV 71-Tab 48].

1.26.7.2 Documents in the record also demonstrate that the state political parties are merely conduits between the national political parties and their media consultants. *See, e.g.*, CRP 00367 [IER Tab 28] (fax from the NRCC to the CRP's Victory 2000 project proving CRP 'wiring info' and informing the state party that the '[m]oney will be in your account today . . . . Please wire back to Strategic Media'); CDP 02095-101, 2103-04, 2106 [IER Tab 12] (wire transfer instructions from the DNC to the CDP for media buys); CDP 02984-89 [IER Tab 12] (detailing transfer of funds from DCCC to CDP for media buy).

1.26.7.3 The RNC and DNC also transfer nonfederal funds to state parties to pay for advertisements over which the national party committees retain control. *See* Castellanos Dep. (Sept. 27, 2002) at 111-12 (stating that when working on advertisements for state parties, National Media dealt with an RNC representative, not a state party member); Marshall Decl. ¶ 4 (noting that the DNC normally approved the content of the advertisement and the amount of money to be spent before calling the state party in question 'to let it know that an ad was coming'); Josefiak Dep. at 97-98 [JDT Vol. 11] (acknowledging that the RNC transfers funds to state parties to pay for RNC advertisements); Huyck Decl. in *Mariani* ¶ 4 (stating that in 1995-1996 the RNC transferred funds to state party committees to pay for issue advertisements related to the 1996 Presidential election campaign) [DEV 79-Tab 60]; Hazelwood[34] Dep. at 118- 19 (RNC transfers funds to state parties to pay for issue advertisements). In 2000, the RNC

[34] Elizabeth Blaise Hazelwood is the RNC's political director. Hazelwood Dep. at 10.

raised over $254 million, a majority of which was transferred to the state parties for various activities. Josefiak Dep. at 76 [JDT Vol. 11]; *see also* FEC, National Party Transfers to State/Local Committees: January 1, 1999 to December 31, 2000, *available at* http://www.fec.gov/press/ 051501party fund/tables/nat2state.html (during the 2000 election cycle the RNC made transfers of approximately $129 million—$93.2 million in nonfederal funds and $35.8 million in federal funds—to state and local parties). The greatest expenditures from these transfers were for political advertising and administrative expenses. Josefiak Dep. at 76-77 [JDT Vol. 11].

1.27 The evidence above clearly demonstrates that the national political parties transfer nonfederal money through their state party affiliates for the purpose of buying so-called 'issue advertisements' at a better allocation ratio. These advertisements are created and controlled by the national political parties, with the state political parties merely accepting the nonfederal money transfers and passing the funds on to media consultants as directed by the national political parties. These advertisements are intended to affect federal elections without using express advocacy terminology.

Get-Out-The-Vote (GOTV)

1.28 It is undisputed that GOTV efforts, paid for with nonfederal funds by national party committees and targeted at federal elections, *directly* assist federal candidates, as well as state and local candidates of the same party whose elections are held on the same day. Declarations from representatives of the four major congressional campaign committees attest to the fact that these committees 'transfer[] federal and nonfederal funds to state and/or local party committees for . . . *get-out-the-vote efforts*. These efforts have a significant effect on the election of federal candidates.' Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab

30] (emphasis added); *see also* Josefiak Decl. ¶ 26 [RNC Vol. I] (Republican Party 'Victory Programs' which include GOTV components are designed to benefit candidates at the *federal*, state and local levels) (emphasis added); Philp[35] Dep. at 47, 49 (when asked '[are there a]ny other services that the party provides to federal candidates,' answering that the Colorado Republican Party's GOTV 'program is designed to benefit all candidates.').

1.28.1 Documentary evidence corroborates the testimony that GOTV efforts assist federal candidates. *See, e.g.*, CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's '*get-out-the-vote efforts*' would help 'increase the number of Californian Democrats in the United States Congress, continue Democratic leadership in the State Senate, take back the State Assembly—and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election.') (emphasis added); CRP 07164 [IER Tab 1.F] (letter from the Executive Director of the Dole-Kemp campaign, stating in part: 'Unfortunately, federal law prohibits the Dole/Kemp campaign from accepting any contributions after the last day of the national convention. However, you can still support the Dole/Kemp ticket by sending your contribution to the Victory '96 fund, which will support the party's '*get out the vote*' operation and help us ensure a successful campaign in California . . .') (emphasis added); *infra* Findings ¶ 1.60 (McConnell letter noting that the Kentucky Victory 2000 campaign, which included a GOTV component, 'was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year').

[35] Alan Philp testified on behalf of the Colorado Republican Party. Philp Dep. at 9 [JDT Vol. 26].

1.28.2 Defendants' expert Donald Green concludes that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Green Expert Report at 14 [DEV 1-Tab 3].

1.28.3 The RNC transfers nonfederal funds to state political parties to subsidize voter mobilization activities of the state parties. Banning[36] Decl. ¶ 31 [RNC Vol. III]; *see also* Duncan[37] Decl. ¶¶ 11-12 [RNC Vol. VI]. According to Josefiak, the RNC also helps state and local parties fundraise for these voter mobilization efforts. *See* Josefiak Decl. ¶¶ 63, 65-72 [RNC Vol. I]; *see also* Benson[38] Decl. ¶ 10 [RNC Vol.

[36] Jay Banning has served as the RNC's Director of Administration and Chief Financial Officer since 1983, and has been employed by the RNC in these and other capacities for twenty-six years. Banning Decl. ¶ 1 [RNC Vol. III].

[37] Robert Duncan is a Member of the RNC from the State of Kentucky. At the time the RNC's Complaint in this case was filed, he served as Treasurer of the RNC, but as of July 2002 he became its General Counsel. Duncan Decl. ¶ 1 [RNC Vol. VI].

[38] Bruce Benson is Chairman of the Colorado Republican Party. Benson Decl. ¶ 1 [RNC Vol. VIII].

VIII] ('[T]he Republican national party committees also assist [the Colorado Republican Party] in raising money for these party building programs.').

1.29 The CDP and the CRP conduct GOTV door-to-door canvassing campaigns, phone banks and mailings. Since federal, state and local candidates are on the same ballot in California, these efforts affect all the candidates on the ballot. This fact explains why these efforts usually required the state parties to use a mix of federal and nonfederal money to pay for such activities. *See, e.g., Bowler* Decl. ¶ 20.b. (noting that CDP slate cards and door hangers often mention both federal and nonfederal candidates and thus were funded with the mix of funds); *id.* (50 to 60 percent of CDP's paid phone banks make reference to a federal candidate and must therefore be paid for with a mix of funds); *see also* Erwin Aff. ¶ 10. It is important to note, however, that under BCRA's Levin Amendment state political parties may still use a mix of nonfederal and federal funds to pay for GOTV efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

1.30 It is clear that nonfederal funds used to finance GOTV efforts for elections with federal candidates on the ballot affect federal elections. It is clear that GOTV activities target a certain political party's likely voters and attempts to get them to the polls. Even if the intent behind such efforts were to only affect state and local contests, increasing the number of Democrats, for example, who vote in a state and local election will undoubtedly increase the number of votes for the federal Democratic candidates who share the same ballot. This fact is well-known and appreciated by the national political parties and federal candidates.

Voter Registration

1.31 It is undisputed that voter registration efforts, paid for with nonfederal funds by the national party committees in the period before federal elections, *directly* assist federal candidates, as well as state and local candidates from the same party whose elections are held on the same day. As Dr. Mann notes:

> In a series of advisory opinions, the Commission sought to ensure that a portion of state party activities benefiting [sic] both federal and nonfederal candidates be paid for with hard money. In Advisory Opinion 1975-21, *the Commission ruled that a local party committee had to use hard dollars to pay for a part of its administrative expenses and voter registration drives, on the grounds that these functions have an indirect effect on federal elections.* It used this opinion in regulations it issued in 1977 governing allocation of administrative expenses between federal and nonfederal accounts. The allocation was to be made 'in proportion to the amount of funds expended on federal and non-federal elections, or on another reasonable basis.' (11 C.F.R. 106.1(e) 1978).

Mann Expert Report at 9 [DEV 1-Tab 1] (emphasis added).

1.32 Representatives of the four major congressional campaign committees, confirm that the four committees 'transfer[] federal and nonfederal funds to state and/or local party committees for . . . *voter registration* . . . efforts. These efforts have a significant effect on the election of federal candidates.' Jordan Decl. ¶ 69 [DEV 7-Tab 21]; Wolfson Decl. ¶ 64 [DEV 9-Tab 44]; Vogel Decl. ¶ 64 [DEV 9-Tab 41]; McGahn Decl. ¶ 56 [DEV 8-Tab 30] (emphasis added); *see also* CDP 00859 [IER Tab 1.I] (letter thanking a CDP donor and noting that CDP's '*voter registration* ... efforts' would help 'increase the number of Californian Democrats in the United States Congress, continue Democratic leadership

in the State Senate, take back the State Assembly—and deliver California's 54 electoral votes for President Bill Clinton's and Vice President Al Gore's re-election.') (emphasis added); *see also* Findings ¶ 1.60 (McConnell letter noting that the Victory 2000 campaign, which included a voter registration component 'was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year'); Philp Dep. at 49 (when asked '[are there a]ny other services that the party provides to federal candidates,' answering that the Colorado Republican Party's GOTV 'program is designed to benefit all candidates. That could include voter registration and so on and so forth.').

1.33 CRP official Erwin[39] testifies that '[t]he overwhelming amount of [voter registration] activity is 'generic' voter registration activity urging potential registrants to 'Register Republican.'' Erwin Aff. ¶ 9. Erwin testifies that the CRP has paid for voter registration—with a mix of federal and nonfederal funds—through its Operation Bounty program, in which Republican county central committees, Republican volunteer organizations and Republican candidates for federal and state office participate. Through its Operation Bounty drives, the CRP has typically registered over 350,000 Republican voters in each election cycle since the 1984 election cycle (except 1997-98). *See* Erwin Aff. ¶ 9; *see also* CDP App. at 1185 [PCS 4] (charting CRP's voter registration activity by election cycle since 1984 cycle).

Ms. Bowler states that the CDP's expenditures on voter registration— consisting of a mix of federal and nonfederal funds—were approximately $145,000 in the 1996 election cycle; $300,000 in the 1998 cycle; $100,000 in the 2000 election cycle; and $185,000 during the period from January

[39] Ryan Erwin is the Chief Operating Officer of the CRP. Erwin Aff. ¶ 1.

1, 2001 to June 30, 2002. *See* Bowler Decl. ¶ 20.a. Ms. Bowler notes that the CDP's expenditures for voter registration were higher in 1998 (a year with eight statewide elections) than in 2000 (a presidential election year). *Id.* CRP and CDP officials testify that 'it is often the case that these voter registration activities are primarily driven by the desire to affect State and local races.' Erwin Aff. ¶ 14a; Bowler Decl. ¶ 20.a.

Whatever their intention, the evidence *supra,* makes clear that these efforts affect federal elections; particularly as demonstrated by the CDP's fundraising materials. *See* Findings ¶ 1.32). Moreover, under the Levin Amendment state political parties may still use a mix of nonfederal and federal funds to conduct voter registration efforts for elections that include federal candidates, as long as they use nonfederal funds raised in accordance with the provision. Of course, for those elections without a federal candidate on the ballot, BCRA does not impose any restrictions.

Redistricting

1.34 The national parties use nonfederal funds, as well as federal funds, toward their redistricting efforts, and these efforts are of value to Members of Congress because the changes in the composition of a Member's district can mean the difference between reelection and defeat.

1.34.1 As Defendants' expert Donald Green notes:

> The most important legislative activity in the electoral lives of U.S. House members takes place during redistricting, a process that is placed in the hands of state legislatures. The chances that a House incumbent will be ousted by unfavorable district boundaries are often greater than the chances of defeat at the hands of the typical challenger. Thus, federal legislators who belong to the state majority party have a tremendous incentive to be attuned to the state legislature and the state party leadership.

> For example, in early 1999 the Republican National Committee, recognizing that state legislatures in Tennessee and Georgia would soon control redistricting, transferred substantial sums of money to those states' Republican parties in an effort to win the few seats necessary to gain the majority. As Edwin Bender, in a report for the National Institute on Money in State Politics explains: 'In a number of states with legislatures that are controlled by narrow margins, a win or two in the state House or Senate in 2000 could mean the difference between a redistricting committee controlled by Democrats or Republicans, and districts that favor one party over the other . . . . As a result, national party organizations have been flooding the states with campaign donations, both soft money and hard, to influence the redistricting process.

Green Expert Report at 11-12 [DEV 1-Tab 3].

1.34.2 The RNC uses a mix of federal and nonfederal funds to support redistricting efforts, including redistricting litigation. Josefiak Decl. ¶ 74 [RNC Vol. I]. In 2002, for example, the RNC budgeted approximately $4.1 million on redistricting. Seventy percent of the redistricting budget was to be funded with nonfederal money. Banning Decl. ¶ 28.i [RNC Vol. III]. The RNC spends more overall on state legislative redistricting than on congressional redistricting. Josefiak Decl. ¶ 74 [RNC Vol. I]; *see also infra* Findings ¶ 1.78.1 (Fortune 100 Company nonfederal money budget request noting that 'because both [national] parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list.').

1.34.3 Mr. Alan Philp, of the Colorado Republican Party, testifies that his party and the Colorado Democratic Party

played a significant role in the state's legislative redistricting process. Philp Dep. at 65 [JDT Vol. 26]. Philp states that the results of the redistricting process '[c]an have a significant impact' on candidates for federal office. *Id.* at 66. He notes that the Colorado Congressional delegation discussed redistricting with the Colorado Republican Party. *Id.*

Other Activities Paid for with Nonfederal Funds

1.35 *Administrative Expenses:* The FEC allowed the RNC to pay for its administrative overhead—including salaries, benefits, equipment, and supplies for party operations at RNC headquarters in Washington, D.C.—with a mix of federal and nonfederal funds. *See* Banning Decl. ¶ 27 [RNC Vol. III]; Bowler Decl. ¶ 15. 'During the 2000 election cycle, the RNC spent $35.6 million of nonfederal funds and $52.9 million of federal funds on administrative overhead.' Banning Decl. ¶ 27 [RNC Vol. III]. 'Administrative overhead includes the operating costs of RNC facilities, such as utility bills and maintenance, fundraising costs, and routine expenses for travel and supplies. Administrative overhead also includes the salaries of RNC employees.' *Id.* According to Plaintiffs' expert La Raja, the RNC spent about one-quarter of their nonfederal disbursements on administration and overhead during the 2000 election cycle and transferred 67 percent to the state parties. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. State parties spent about 30 percent of their nonfederal money disbursements during the 2000 election cycle on administrative expenses and overhead. La Raja Expert Report ¶ 22 [RNC Vol. VII]; *see also* Bowler Decl. ¶ 15 (stating that allocation is required for administrative expenses like rent, utilities, and salaries). The fact these expenditures required a mix of federal and nonfederal funds demonstrates that these activities affect federal elections. *See also supra* Findings ¶ 1.26.4 (Plaintiffs expert La Raja stating administrative expenses are not 'party building' activity).

1.36 *Training Seminars:* Banning testifies that the RNC used a mix of federal and nonfederal funds to conduct training seminars for Republican candidates, party officials, activists and campaign staff, many of whom are involved in state and local campaigns and elections. Topics included grassroots organizing, fundraising and compliance with campaign finance regulations. During the 2000 election cycle at least 10,000 people attended RNC-sponsored training sessions, including 117 'nuts and bolts' seminars on grassroots organizing and get-out- the-vote activities. During the same cycle the RNC spent $391,000 in nonfederal funds and $671,000 in federal funds on such training and support. *See* Banning Decl. ¶ 28(c) [RNC Vol. III]; *see also* La Raja Expert Report at 11 [RNC Vol. VII] (parties 'help candidates by training them and their campaign staff,' support which 'can make an important difference in whether a candidate chooses to run for office, particularly in an era of cash-intensive campaigning that requires skillful application of advanced campaign technologies'). According to La Raja, the RNC spent $8.5 million in nonfederal funds directly on all of its grassroots and voter mobilization activities for the 2000 election cycle. La Raja Expert Report ¶ 14(c) [RNC Vol. VII]. This constitutes about one-half of one percent of all RNC nonfederal spending during the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6] (showing the RNC spent $163,521,510 in nonfederal funds during the 2000 election cycle). Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.37 *State and Local Governmental Affairs:* The RNC provided $100,000 of seed money for the formation of a Republican state attorneys general association that focuses on state issues. RNC Ex. 978; *see also* Josefiak Decl. ¶¶ 82-84 [RNC Vol. I]. According to Banning, during the 2000 election cycle the RNC spent $199,000 in nonfederal funds and $333,500 in federal funds on state and local

governmental affairs. *See* Banning Decl. ¶ 28.b [RNC Vol. III]. The nonfederal funds the RNC spent on state and local governmental affairs constituted a minuscule percentage of the RNC's $163,521,510 nonfederal budget for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.38 *Minority Outreach:* Banning states that the RNC used a mix of federal and nonfederal funds to support efforts to increase minority involvement and membership in the Republican Party. During the 2000 election cycle the RNC spent $1,211,000 in nonfederal funds and $2,163,000 in federal funds on support of allied groups and minority outreach. *See id.* ¶ 28.e. This nonfederal expenditure also constituted a minuscule percentage of the RNC's total non-federal spending for the 2000 election cycle. *See* Biersack Decl. Table 2 [DEV 6-Tab 6]. Furthermore, by virtue of the fact these activities were paid for with a mix of federal and nonfederal funds demonstrates that they affect federal elections.

1.39 *State and Local Elections:* The RNC's Josefiak testifies that 'the RNC actually focuses many of its resources on purely state and local election activity,' Josefiak Decl. ¶ 19 [RNC Vol. I]; however, the figures provided to the Court do not support this contention. For example, in 1999 and 2000 the RNC donated approximately $7.3 million in nonfederal funds to state and local candidates. Josefiak Decl. ¶ 61 [RNC Vol. I]; Banning Decl. ¶ 28(a) [RNC Vol. III]. However, this amount is a small fraction of the $163,521,510 in nonfederal funds it spent during the 2000 election cycle. Biersack Decl. Table 2 [DEV 6-Tab 6]. Plaintiffs' expert La Raja finds that the Republican Party allocated just seven percent ($9.5 million) of their nonfederal funds during the 2000 election cycle for contributions to state and local candidates. La Raja

Expert Report ¶ 14(b) [RNC Vol. VII]. Furthermore, according to Defense expert Mann, the two national parties donated 'only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000.' Mann Report at 26 [DEV 1-Tab 1] (citation omitted).

1.39.1.1 The RNC also provides testimony that it 'sometimes devotes significant resources toward states with competitive gubernatorial races even though the races for federal offices are less competitive.' Josefiak Decl. ¶ 62 [RNC Vol. I]. According to Josefiak, in 2000, most observers believed that Indiana was a 'safe' state for George W. Bush and that it did not have a competitive Senate race. 'Nevertheless, the RNC committed significant resources to the state in hopes of influencing the gubernatorial race.' Josefiak Decl. ¶ 62 [RNC Vol. I]. Josefiak's declaration provides no figures to allow the Court to determine what constitutes 'significant resources.' Furthermore, although Indiana may have been a 'safe' state for the Republican presidential candidate and the Republican candidate for U.S. Senate, the Indiana ballot provided voters with three federal races in which to vote, meaning that many expenditures, even if intended to only influence a single state race, affected federal election races. Most importantly, nothing in BCRA prevents the RNC from using unlimited amounts of federal funds to affect any state election.

1.39.1.2 Five States—Kentucky, Louisiana, Mississippi, New Jersey and Virginia—hold elections for state and local office in odd-numbered years when there are typically no federal candidates on the ballot. *See* Josefiak Decl. ¶ 41 [RNC Vol. I]. Likewise, numerous cities—including Houston, Indianapolis, Los Angeles, Minneapolis and New York City—hold mayoral elections in odd- numbered years. *See id.* RNC officials state that for elections in which there is no federal candidate on the ballot, the RNC frequently trains

state and local candidates, contributes to state and local candidate campaign committees, funds communications calling for election or defeat of state and local candidates, and supports get-out-the-vote activities. *See* Banning Decl. ¶ 28(a) [RNC Vol. III]; Josefiak Decl. ¶¶ 19, 41-59 [RNC Vol. I]. The RNC's CFO Jay Banning testifies that in 1999 and 2001, including transfers to state parties, direct contributions to local and state campaigns, and direct RNC expenditures, the RNC spent approximately $21 million in nonfederal funds in 1999 and 2001 (approximately $5.7 million in 1999, $15.7 million in 2001). Banning Decl. ¶ 28(a) [RNC Vol. III]; *see also* Duncan Decl. ¶¶ 14-15 [RNC Vol. VI] (discussing RNC contributions to Kentucky state and local races). Defendants' expert Mann states that donations to gubernatorial candidates in an odd numbered year is not something intended to affect a Federal election. Mann Cross Exam. at 71. Again, BCRA does not preclude the national political parties from spending unlimited federal funds on such activities. Furthermore, state political parties can spend nonfederal funds on such campaigns without limit as long as no federal election is held at the same time. *See, e.g.*, Torres[40] Decl. ¶ 8 [3 PCS] (stating that the CDP has spent millions of dollars in nonfederal funds supporting candidates in Los Angeles).

1.40 With the exception of administrative expenses, the activities paid for with nonfederal funds listed *supra* constituted a very small portion of the political parties' nonfederal expenditures during the 2000 election cycle. Furthermore, administrative expenses, training seminars, expenditures on state and local governmental affairs, and minority outreach, were all paid for with a mixture of federal and nonfederal funds meaning that these activities have some impact on federal elections.

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[40] Art Torres is the elected chair of the CDP. Torres Decl. ¶ 1 [3 PCS].

The State Parties Have Become 'Branches' of the National Parties

1.41 The evidence *supra* clearly demonstrates that nonfederal money has not been used primarily for 'party building' activities as the authorizing rationale envisioned; rather, the funds are being used by the national parties for electioneering activities and the state parties have been coopted as part of this effort.

1.42 The emergence of nonfederal money as a potent force in national politics has made the state political parties, according to Plaintiffs' expert La Raja, 'more reliant on the national parties. They have worked more with the national parties. They have become what I term branch organizations, which to me is not a pejorative. It means they work more closely with the national organization,' 'they still retain autonomy. However, they're integrated more with the national party structure.' La Raja Cross Exam. at 43-44, 60 [JDT Vol. 15]. This has lead to a 'nationalized party system, [where] state parties use national party resources to advance national party goals.' *Id.* at Ex. 3 at 88, 101. 'The national parties employ the state parties as instruments to pursue federal electoral goals, particularly through issue ads sponsored by state organizations [paid for with nonfederal money transferred from the national political parties].' *Id.* at 104.

1.43 The close affiliation between the state, local and national parties is clear from their cooperation during election campaigns that include state and federal elections.

1.43.1 Ms. Bowler testifies that the CDP works closely with the DNC in planning and implementing 'Coordinated Campaigns,' the purpose of which is to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. Party officials, candidates at all levels of the ticket and their agents participate in Coordinated Campaigns and collectively make decisions regarding the

solicitation, receipt, directing, and spending of the CDP's funds, both federal and nonfederal. Bowler Decl. ¶¶ 5, 29 [3 PCS]. According to Bowler, the CDP is 'integrally related to the [DNC].' *Id.* ¶ 5.

1.43.2 The RNC's 'Victory Plans' are voter contact programs designed to support the entire Republican ticket at the federal, state, and local levels. The RNC works with every state party to design, fund and implement the Plans. *See* Benson Decl. ¶ 8 [RNC Vol. VIII]; Josefiak Decl. ¶ 26 [RNC Vol. I]; Peschong Decl. ¶¶ 4-5 [RNC Vol. VI].

1.43.2.1 According to RNC Chief Counsel Josefiak, Victory Plans are formulated and implemented after extensive and continuous collaboration between the RNC and the state parties; each Plan is tailored to the unique needs of each State and designed to stimulate grassroots activism and increase voter turnout in the hopes of benefitting candidates at all levels of the ticket. Josefiak Decl. ¶¶ 25-40 [RNC Vol. I]. According to Mr. Erwin, the CRP works closely with the RNC in planning and implementing a Victory Plan. The Victory Plan is implemented in the general election cycle with the full involvement of RNC staff, CRP staff, state legislative leadership and representatives from the top of the ticket campaigns. *See* Erwin Aff. ¶ 4 [3 PCS]. 'By their nature, the Victory Plans and the programs specified in them span the calendar year, not just the 60 or 120 days prior to the election.' Peschong Decl. ¶ 4 [RNC Vol. VI]. The Victory Plans generally incorporate rallies, direct mail, telephone banks, brochures, state cards, yard signs, bumper stickers, door hangers, and door-to-door volunteer activities. *Id.*

1.43.2.2 According to Josefiak, in 2000 the RNC transferred approximately $42 million to state parties to use in Victory Plan programs, 60 percent (about $25 million) of which was nonfederal money, not including money spent on broadcast 'issue advertising.' Josefiak Decl. ¶ 31 [RNC Vol.

I]; *see also* Peschong[41] Decl. ¶¶ 4, 8-9 [RNC Vol. VI] (stating that '[t]he RNC typically provides a very substantial share of the funding of state victory programs.').

1.43.2.3 State Republican party officials observe that because there are often numerically more state and local races than federal races during a given election, Victory Plans 'often place greater emphasis' on the non-federal races. *See* Benson Decl. ¶ 8 [RNC Vol. VIII]; Bennett Decl. ¶ 17.k [RNC Vol. VIII] (stating that the average ratio of state and local candidates to federal candidates in Ohio in 2002 is 18 to 1). This observation does not change the fact that Victory Plans are designed to 'support the entire ticket.' Benson Decl. ¶ 8 [RNC Vol. VIII] (emphasis added).

Efforts to Address the Role of Nonfederal Funds in Campaign Finance Must Limit State Party Use of Nonfederal Funds that Affect Federal Elections

1.44 It is clear that state political party electoral activities affect federal elections, especially when state and federal elections are held on the same date. The record establishes that federal officeholders value these services and that they solicit nonfederal donations for the state political parties in order to assist their own campaigns. National political parties also solicit nonfederal donations for their state counterparts and transfer nonfederal funds as part of their efforts to affect federal elections. *See infra* Findings ¶ 1.59. The workings of this campaign finance system demand that if one wants to address the impact of nonfederal money, one cannot ignore the state role in the system. Former Members of Congress concur. Former Senator Rudman states clearly:

> To curtail soft-money fundraising and giving, it is necessary to have a comprehensive approach that addresses

[41] John Peschong is the RNC's Regional Political Director for the Western Region. Peschong Decl. ¶ 1.

> the use of soft money at the state and local party levels as well as at the national party level. The fact is that much of what state and local parties do helps to elect federal candidates. The national parties know it; the candidates know it; the state and local parties know it. If state and local parties can use soft money for activities that affect federal elections, then the problem will not be solved at all. The same enormous incentives to raise the money will exist; the same large contributions by corporations, unions, and wealthy individuals will be made; the federal candidates who benefit from state party use of these funds will know exactly whom their benefactors are; the same degree of beholdenness and obligation will arise; the same distortions on the legislative process will occur; and the same public cynicism will erode the foundations of our democracy—except it will all be worse in the public's mind because a perceived reform was undercut once again by a loophole that allows big money into the system.

Rudman Decl. ¶ 19 [DEV 8-Tab 34]. Former Senator Brock comments:

> It does no good to close the soft money loophole at the national level, but then allow state and local parties to use money from corporations, unions, and wealthy individuals in ways that affect federal elections. State and local parties use soft money to help elect federal candidates both by organizing voter registration and get-out-the-vote drives that help candidates at all levels of the ticket, and by using soft and hard money to run 'issue ads' that affect federal elections. Therefore, for soft money reforms to be truly effective, it is vitally important to require the use of hard money at the state level to pay for activities that affect federal elections.

Brock Decl. ¶ 8 [DEV 6-Tab 9].

Summary

1.45 The evidence *supra* clearly demonstrates that nonfederal money has become an increasingly important part of the national political parties' campaign efforts. The increase in nonfederal fundraising and spending, especially since 1994, has been dramatic, and is due to the advent of the so-called 'issue advertisement.' Political party issue advertisements do not include words of express advocacy, but are engineered to still have an impact on federal elections. Despite their effect, the fact that these advertisements do not constitute express advocacy has allowed the political parties to use nonfederal money, raised in part from the treasuries of corporations and labor unions, to fund these commercials and thereby skirt campaign finance laws. Furthermore, these advertisements make a mockery of the original justification for allowing the political parties to raise these funds, as they have nothing to do with 'party building.' Plaintiffs' own expert finds that these funds have been spent primarily on electioneering and not on strengthening the political parties.

The fact that the national political parties found a huge loophole through which to circumvent the federal campaign finance regime was only the first step. In order to maximize the power of this new-found political tool, the national political parties coopted their state party affiliates, or branches as Plaintiffs' expert calls them, and funneled nonfederal funds through them in order to take advantage of the state political parties' more attractive allocation ratios. By doing so, the national parties minimized the amount of federal funds needed to purchase advertisements designed to affect federal elections-advertisements that in the spirit of FECA should have been paid for completely with federal funds. As a result, the state political parties became an integral part of the national political parties' nonfederal money strategy, and

therefore any effort to deal with the use of nonfederal funds in the campaign finance regime requires addressing the state political parties.

Not all nonfederal funds are spent on political advertisements, but these advertisements constitute the largest category of nonfederal spending of the national and state political parties. Furthermore, other activities, such as voter registration and GOTV, that are paid for in part with nonfederal funds clearly affect federal elections when state and local elections are held on the same day as the federal election. Redistricting efforts affect federal elections no matter when they are held. In sum, the political parties used nonfederal funds to circumvent FECA and affect federal elections.

The Role of Federal Lawmakers in Political Party Nonfederal Fundraising

1.46 Unlike other entities, political parties have uniquely close relationships with candidates they nominate and support, and who, in turn, lead the party. *See* D. Green Expert Report at 7-9 [DEV 1-Tab 3]; McCain Decl. ¶¶ 22- 23 [DEV 8-Tab 29]. The Colorado Republican Party has stated in past litigation: 'A party and its candidate are uniquely and strongly bound to one another because: [a] party recruits and nominates its candidate and is his or her first and natural source of support and guidance[;] [a] candidate is identified by party affiliation throughout the election, on the ballot, while in office, and in the history books[;] [a] successful candidate becomes a party leader, and the party continues to rely on the candidate during subsequent campaigns[;] [a] party's public image largely is defined by what its candidates say and do[;] [a] party's candidate is held accountable by voters for what his or her party says and does[;] [a] party succeeds or fails depending on whether its candidates succeed or fail. No other political actor shares comparable ties with a candidate.' Brief of Colorado Republican Party in *FEC v.*

Colorado Republican Fed. Campaign Comm. ('*Colorado II*'), 533 U.S. 431, 457 (2001), at 19-20; *see also id.* at 7-8, 26-31; Philp Dep. at 47-54 [JDT Vol. 26].

Federal Lawmakers Run the Party Committees

1.47 The national committees of the two major political parties are: the Republican National Committee ('RNC'); the National Republican Senatorial Committee ('NRSC'); the National Republican Congressional Committee ('NRCC'); the Democratic National Committee ('DNC'); the Democratic Senatorial Campaign Committee ('DSCC'); and the Democratic Congressional Campaign Committee ('DCCC'). Vogel Decl. ¶ 6 [DEV 9-Tab 41]; McGahn Decl. ¶ 6 [DEV 8-Tab 30]; Jordan Decl. ¶ 6 [DEV 7-Tab 21]; Wolfson Decl. ¶ 6 [DEV 9-Tab 44]. The primary purpose of the congressional committees is to ensure the election of candidates from their respective parties to their respective legislative body and otherwise support the goals of their party. *Id.*

> The national party committees are dominated by elected public officials—the president or presidential candidate in the case of the Republican and Democratic National Committees, the top House and Senate party leaders for the congressional campaign committees. . . . There is no meaningful separation between the national party committees and the public officials who control them.

Mann Expert Report at 29 (citations omitted) [DEV 1-Tab 1]; *see also* Krasno & Sorauf Expert Report at 9-10 ('Simply put, no wall between the national parties and the national government exists.'), 12-13 ('Party committees are headed by or enjoy close relationships with their leading officials, individuals who by virtue of their positions, reputations, and control of the legislative machinery have special influence on their colleagues.') [DEV 1-Tab 2]; Green Expert Report at 9-10 [DEV 1-Tab 3] ('Political parties, it should be noted, are structured along very different principles

from the American government. One such principle is the separation and dispersal of power, of which one finds many examples in the Constitution. . . . Leaders of legislative party caucuses may also serve as members or leaders of party campaign committees. Furthermore, party leaders are drawn disproportionately from the ranks of those who hold important legislative leadership posts. . . . [T]he internal structure of parties permits, for example, former U.S. Senator D'Amato, who chaired the [RSCC] from 1995-97, to at the same time serve as chair of the Senate Banking, Housing, and Urban Affairs Committee. Parties, in contrast to the law-making institutions they inhabit, are organized in ways that concentrate authority, entrusting multiple roles to particular individuals.'); Rudman Decl. ¶ 6 [DEV 8-Tab 34]; Vogel Decl. ¶ 4 [DEV 9-Tab 41] (NRSC is comprised of sitting 'Republican Members of the United States Senate . . . . The chair of the NRSC is elected by the Republican Caucus of the United States Senate.'); Jordan Decl. ¶ 4 [DEV 7- Tab 21] (the DSCC 'is comprised of sitting Democratic Members of the United States Senate . . . . The chair of the DSCC is appointed by the Democratic Leader of the United States Senate.'); McGahn Decl. ¶ 4 [DEV 8-Tab 30] (the NRCC includes the 'entire elected Republican leadership' and its executive committee includes 'the Speaker of the House, the Majority Leader, the Republican Whip, Conference Chairman, the Conference Vice-Chairman, the Conference Secretary, the Policy Chairman and the NRCC Chairman'); Wolfson Decl. ¶¶ 4 [DEV 9-Tab 44] (the DCCC is comprised of sitting Democratic Members of (or Delegates to) the United States House of Representatives, and the Chair of the DCCC is elected by the Democratic Caucus of the United States House of Representatives).

1.48 'For at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The

presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign.' Sorauf/Krasno Report in *Colorado Republican* at 27 [DEV 73-Tab C].

Political parties are primarily concerned with electing their candidates and the money they raise is spent assisting their candidates' campaigns. As Congressman Meehan explained:

> The ultimate goal of a political party such as the Democratic Party is to get as many Party members as possible into elective office, and in doing so to increase voting and Party activity by average Party members. The Party does this by developing principles on public policy matters the Party stands for, and then by finding candidates to run for the various political offices who represent those principles for the Party. When the Party finds its candidates, it tries to raise money to help get like-minded people to participate in the elections, and to try to get the Party's candidates the resources they need to get their message out to voters. In my experience, political parties do not have economic interests apart from their ultimate goal of electing their candidates to office.

Meehan Decl. in *RNC* ¶¶ 3-4 [DEV 68-Tab 30]. Senator Bumpers testifies that he is 'not aware that the [Democratic] party has any interest in the outcome of public policy debates that is separate from its interest in supporting and electing its candidates.' Bumpers Decl. ¶ 6 [DEV 6-Tab 10]. Senator McCain testifies that '[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected.' McCain Decl. ¶ 23 [DEV 8-Tab 29].

1.49 In general, the RNC espouses three core principles as guiding the mission of the national Republican Party, which

includes electing candidates to national, state and local offices who represent the RNC's political views. In practice, electing these candidates is the RNC's primary focus.

1.49.1 The RNC's Chief Counsel, Thomas Josefiak, attests that

> [t]he Republican Party has a long and rich history advocating some core principles: a smaller federal government, lower taxes, individual freedom, and a strong national defense. The RNC achieves these principles through three primary means: (1) promoting an issue agenda advocating Republican positions on issues of local, state, regional, national and international importance; (2) electing candidates who espouse these views to local, state and national offices; and (3) governing in accord with these views. Although these efforts sometimes overlap, they also frequently occur independently of one another.

Josefiak Decl. ¶ 22 [RNC Vol. I]. Other documents in the record, however, show that the RNC and Republican state parties' primary purpose is to elect Republican candidates to office. *See, e.g.*, RNC's Resp. to FEC RFA's in *RNC*, No. 40 [DEV 68-Tab 35]; ODP0021-02003 [DEV 70-Tab 48] (RNC Memorandum in which Chairman Haley Barbour states: 'The purpose of a political party is to elect its candidates to public office, and our first goal is to elect Bob Dole president. . . . Electing Dole is our highest priority, but it is not our only priority. Our goal is to increase our majorities in both houses of Congress and among governors and state legislatures.'); Knopp[42] Cross Exam. at 10 [JDT Vol. 13] (stating that the primary purpose of the RNC is 'to elect Republicans to state, local, and national office'); Brister[43] Decl. ¶ 4 [RNC Vol.

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[42] Janice Knopp is the RNC's Deputy Director of Finance/Marketing Director. Knopp Decl. ¶ 1 [RNC Vol. V].

[43] Pat Brister is the Chairman of the Republican Party of Louisiana. Brister Decl. ¶ 1 [RNC Vol. VIII].

VIII] ('The Republican Party of Louisiana's primary purpose is to help elect Republicans to office 'from the courthouse to the White House''). Whether the Republican Party's 'core principles' drive its pursuit of electoral majorities, or vice versa, is a chicken-or-the-egg type quandary that I need not resolve at this juncture. What is clear from the evidence, however, is that regardless of whether or not it is done to advocate the party's principles, the Republican Party's primary goal is the election of its candidates who will be advocates for their core principles. As Dr. Green observes: 'In order to obtain power a party must win elections; and in order to win elections, elected officials scramble to claim credit for good legislative deeds while publicizing the misdeeds of the opposition party.' Green Expert Report at [DEV 1-Tab 3].

1.50 The evidence makes clear that the national party committees are creatures of their elected federal politician members, who run them and set their priorities. It is clear that the national party committees are focused on electing their candidates to federal office, and in the case of the DNC and RNC are actually subsumed by their respective Presidential candidates' campaigns. Given these facts, it is not surprising that the national party committees use their elected officials to solicit donations.

Federal Lawmakers Solicit Nonfederal Funds for the National Party Committees

1.51 It is a common practice for Members of Congress to be involved in raising both federal and nonfederal dollars for the national party committees, sometimes at the parties' request. The personal involvement of high-ranking Members of Congress is a major component of raising federal and nonfederal funds.

Current and former Members of Congress acknowledge this fact. *See, e.g.*, Rudman Decl. ¶ 12 [DEV 8-Tab 34];

Bumpers Decl. ¶¶ 7-9 [DEV 6-Tab 10]; Simon[44] Decl. ¶ 7 [DEV 9-Tab 37] ('While I was in Congress, the DCCC and the DSCC would ask Members to make phone calls seeking contributions to the party. They would assign me a list of names, people I had not known previously, and I would just go down the list. I am certain they did this because they found it more effective to have Members make calls.'); Simpson[45] Decl. ¶ 4 [DEV 9- Tab 38]; McCain Decl. ¶¶ 2, 21 [DEV 8-Tab 29] ('Soft money is often raised directly by federal candidates and officeholders, and the largest amounts are often raised by the President, Vice President and Congressional party leaders.'); Feingold Dep. at 91-93 [JDT Vol. 6]; Shays Decl. ¶ 18 [DEV 8-Tab 35] ('Soft money is raised directly by federal candidates, officeholders, and national political party leaders. National party officials often raise these funds by promising donors access to elected officials. The national parties and national congressional campaign committees also request that Members of Congress make the calls to soft money donors to solicit more funds.'); Meehan Decl. in *RNC* ¶ 6 [DEV 68-Tab 30] ('Members of Congress raise money for the national party committees, and I have been involved in such fund-raising for the Democratic Party. At the request of the Party Members of Congress go to the [DCCC] and call prospective donors from lists provided by the Party to ask them to participate in Party events, such as DCCC dinners or [DNC] dinners. These lists typically consist of persons who have contributed to the Democratic Party in the past.').

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[44] Senator Paul Simon served as a United States Senator for Illinois from 1985 to 1997, and was a Member of the House of Representatives from 1975 to 1985. Prior to being elected to Congress, Senator Simon served as Lieutenant Governor of Illinois from 1968 to 1972, and served in the Illinois House of Representatives from 1954 to 1962 and in the Illinois State Senate from 1962 to 1966. Simon Decl. ¶ 1 [DEV 9-Tab 37].

[45] Senator Alan Simpson served as United States Senator from Wyoming from 1979 to 1997. Simpson Decl. ¶ 2 [DEV 9-Tab 38].

Representatives of the House and Senate congressional campaign committees testify that their committees and their leadership ask Members of Congress to raise funds in specified amounts or to devote specified periods of time to fundraising. Jordan Decl. ¶ 33 [DEV 7-Tab 21]; Vogel Decl. ¶¶ 32-33 [DEV 9-Tab 41]; McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Wolfson Decl. ¶ 35 [DEV 9-44] (stating that the DSCC, NRSC, NRCC, and DCCC ask members of Congress to raise money for the committees).

Political donors also testify that Members of Congress solicit nonfederal money. *See, e.g.*, Randlett[46] Decl. ¶¶ 6-9 [DEV 8-Tab 32] ('I've been involved in political fundraising long enough to remember when soft money had little value to federal candidates. Ten years ago, a Senator might call a potential donor and the donor would say something like, 'I would love to write you a check; I'm a big fan of yours; but I'm federally maxed, so I can't do it. If you like, I could write a soft money check to your state party.' And the Senator might say, 'Don't bother. The soft money just doesn't do me any good.' However, in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular

[46] Wade Randlett is Chief Executive Officer of Dashboard Technology, a World WideWeb technology consulting firm based in San Francisco, California. Prior to founding Dashboard Technology, Mr. Randlett served on the management teams of two other software companies. He was the Democratic political director at the Technology Network, also known as TechNet, a Palo Alto-based non-profit corporation and political service organization which he co-founded in 1996. Prior to starting TechNet, he spent many years as a political fundraiser and general political consultant, working primarily in the Silicon Valley area of Northern California, but also throughout California and to some extent in major metropolitan areas in other parts of the nation. Randlett Decl. ¶ 2 [DEV 8- Tab 32].

state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.').

Lobbyists also find that Members of Congress are involved in fundraising for their political parties. *See* Rozen[47] Decl. ¶ 15 [DEV 8-Tab 33] ('Even though soft money contributions often go to political parties, the money is given so that the contributors can be close to, and recognized by, Members, Presidents, and Administration officials who have power. Members, not party staffers or party chairs, raise much of the large soft money contributions. Party chairs do not have that much power because the DNC and the RNC by themselves don't have power to do anything. So people are not giving to be close to the party chairs. The Members of Congress and the President are the heart of the national parties. The elected officials are the ones who are really raising the money, either directly or through their agents.'); *see also* Murray[48] Dep. in

[47] Robert Rozen worked as a lobbyist for various interests at the law firm Wunder, Diefenderfer, Cannon & Thelen from 1995 until 1997. For the last six years, he has been a partner in a lobbying firm called Washington Counsel; now Washington Council Ernst & Young. Mr. Rozen represents a variety of corporate, trade association, non-profit, and individual clients before both Congress and the Executive Branch. His work includes preparing strategic plans, writing lobbying papers, explaining difficult and complex issues to legislative staff, and drafting proposed legislation. He also organizes fundraisers for federal candidates and from time-to-time advises clients on their political contributions. Rozen Decl. ¶ 4 [DEV 8-Tab 33]

[48] Daniel Murray served as a government relations specialist for Sprint, GTE and BellSouth Corporations from 1982 until 1995. As Executive Director of those companies, he assisted them and their PACs in selecting candidates and political groups for financial support in both federal and nonfederal funds. During this period he also served on the Democratic Business Council of the DNC, the Advisory Council of the Democratic Leadership Council, the 1998 and 1992 DNC Convention Site Selection Committees, the DSCC Leadership Circle, the DCCC Annual Dinner Committee, the RSCC Annual Dinner Committee, and steering com-

Mariani at 41-42 [DEV 79-Tab 58]; Rozen Decl., Ex. A ¶ 7 [DEV 8-Tab 33].

Finally, documentary evidence corroborates this testimony. ODP0037-00062 [DEV 71-Tab 48] (Letter to NRSC Chairman's Foundation member seeking a renewal contribution signed by Senator McConnell); ODP0037-00884 [DEV 71-Tab 48] (letter from Senator McConnell thanking donor for $5,000 federal and $25,000 nonfederal donation to NRSC's issue advocacy campaign); ODP0031-00821 (letter from contributor to RNC with contribution, stating 'Congressman Scott McInnis deserve [sic] most of the recruitment credit'); ODP0037-00882 (a solicitation letter from Senator McConnell to potential donor at the Microsoft Corporation, expressing the hope that this person would 'take a leadership role with [McConnell] at the NRSC in support of the Committee's issue advocacy campaign. The resources we raise now will allow us to communicate our strategy through Labor Day. . . . Your immediate commitment to this project would mean a great deal to the entire Republican Senate and to me personally.'); ODP0037-01171 to 72 [DEV 71-Tab 48] (correspondence referencing solicitations by federal officeholders and candidates); *infra* Finding ¶ 1.74.3 (Fortune 100 company's documents stating that Members of Congress had requested nonfederal donations).

1.52 'The parties often ask Members to solicit soft money from individuals who have maxed out to the Member's campaign.' Simpson Decl. ¶ 6 [DEV 9-Tab 38]; *see also* Meehan Decl. in *RNC* ¶ 6 ('Party leaders also ask a Member to call his or her own 'maxed out' donors—those who have contributed to that Member the maximum amount of 'hard money' allowed under the [FECA]—in order to request

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mittees for many House and Senate campaigns. Since 1995, he has acted as a government relations consultant for business and other clients. Murray Aff. in *Mariani* ¶¶ 3-5 [DEV 79-Tab 59].

further donations to the Party including those which are not restricted by the Act ('soft money').') [DEV 68-Tab 30]; Billings Decl., Ex. A ¶ 12 [DEV 6-Tab 5]; Jordan Decl. ¶ 20 [DEV 7-Tab 21] ('When donors have reached their federal contribution limit, the DSCC frequently encourages them to make additional donations to the DSCC's nonfederal account.'); Wolfson Decl. ¶ 21 (same for DCCC); Vogel Decl. ¶ 20 (same for NRSC); McGahn Decl. ¶ 21 (same for NRCC); Sorauf/Krasno Report in *Colorado Republican*, at 13-14 [DEV 68-Tab 44]; ODP0018- 00620 to 21 [DEV 69-Tab 48] (federal candidate noting that he 'recently sent a letter to [his] maxed out donors suggesting contributions to the NRCC'); Kirsch[49] Decl. ¶ 8 ('[O]nce a federal candidate understands that a donor has maxed out, there will often be a request that the donor make soft money donations to a national party committee, as has been suggested when I have been in that situation.') [DEV 7-Tab 23]; La Raja Cross Exam. Ex. 3 at 54 [JDT Vol. 15] ('[I]t is common practice for a candidate to encourage donors to give to the party when they have 'maxed' their federal contributions to his or her committee').

1.53 Mr. Vogel, General Counsel of the NRSC, testifies that '[s]ometimes, the NRSC urges Republican Senators to contact particular donors because of shared public policy views, such as outreach efforts to the high-tech community by Senators with an interest in those issues.' Vogel Decl. ¶ 28 [DEV 9-Tab 41]; *see also id.* Tab D at NRSC 066-000009 (draft letter from chairmen of the NRSC and NRCC Technology Committees inviting High Technology CEOs to the 1998 Republican House-Senate Dinner in response 'to your industry's plea for a voice on the cutting edge issues so

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[49] Steven T. Kirsch is founder and Chief Executive Officer of Propel Software Corporation. He has donated millions of dollars to the Democratic Party and to 'progressive candidates and groups.' Kirsch Decl. ¶¶ 2, 4 [DEV 7-Tab 23].

important to the future of high technology' and noting that the dinner is the 'most prestigious annual event, and all Republican members of the U.S. House and Senate will be in attendance.') [DEV 9-Tab 41]. The DCCC engages in similar practices. Wolfson Decl. ¶ 31 [DEV 9-Tab 44] ('Sometimes, the DCCC urges Democratic House Members to contact particular donors because of shared public policy views. For example, the DCCC has sought and received assistance from particular Democratic House Members in fundraising from the labor community, because those Members had a strong public record of support for labor.'); *see also* Randlett Decl. ¶ 6 [DEV 8-Tab 32] ('National party committees often feel they need to raise a certain amount of soft money for a given election cycle. To reach that overall goal, they may divide up potential donors by geography, affiliated organization, or issue interests. The party committees decide which Members of Congress should contact these potential donors, and these Members then put in a certain amount of call time at the national committee soliciting the money. A Member and a potential donor may be matched because the Member is on a legislative committee in which the donor has a particular interest, whether economic or ideological.').

1.54 Despite the foregoing evidence, the Finance Director of the RNC states that it is 'exceedingly rare' for the RNC to rely on federal officeholders for personal or telephonic solicitations of major donors. *See* B. Shea[50] Decl. ¶ 17 [RNC Vol. V]. She states that by RNC policy and practice, the RNC Chairman, Co-Chairwoman, Deputy Chairman, fundraising staff or members of major donor groups—not federal officeholders—undertake initial contact and solicitation of major donors of both federal and nonfederal funds. *Id.* Whether or not initial solicitations by federal officials on behalf of the RNC are rare, the record shows that they

[50] Beverly Shea is the RNC's Finance Director. Shea Decl. ¶ 1 [RNC Vol. V].

are made. RNC0178497 (May 10, 1996, letter from RNC Chairman Haley Barbour to Senators, asking to use their name for a 'membership recruitment package,' which while 'not directly solcit[ing] funds,' 'will serve as a set-up letter for the membership invitation package that will be mailed several days after this letter.'). Furthermore, Members of Congress solicit funds for the RNC from those who have donated in the past. *See, e.g.*, RNC0266088-91 (handwritten notes determining which Member of Congress would call particular potential donors); RNC0250514-15 (April 1997 solicitation letter from Speaker Gingrich asking donors 'to continue [their] support [for] the President's Club'); Moreover, it is clear that Ms. Shea does not speak for the NRSC or the NRCC which clearly use Members to solicit funds. *See, e.g.*, Findings ¶ 1.51.

1.55 Raising nonfederal funds for the political parties can be in a Member's interest. For example, the amount of money a Member of Congress raises for the national political party committees often affects the amount the committees give to assist the Member's campaign. *See, e.g.*, Boren[51] Decl. ¶ 4 [DEV 6- Tab 8] ('[T]he DSCC and other national party organizations kept records, or 'tallies' of how much soft money a Senator had raised for the party. The DSCC then gave little [nonfederal] money to the campaigns of those Senators who had not raised adequate [nonfederal] party funds. In my view, this practice demonstrates very clearly that soft money is not used purely for 'party building' activities, but that there is at least a working understanding among the party officials and Senate candidates that the money will benefit the individual Senators' campaigns.'); *id.* (explaining that because he 'minimized' the amount of time he spent raising soft money for the DNC, he 'received almost no money from the Democratic Party for my campaigns.');

[51] Senator David Boren served as a United States Senator from Oklahoma from 1979-1994. Boren Decl. ¶ 2 [DEV 6-Tab 8]

Bumpers Decl. ¶ 11 [DEV 6-Tab 10] ('Members who raise money for the DSCC expect some of that money to come directly back to them. Part of this unwritten but not unspoken rule is that if you do not raise a certain amount of money for the DSCC, you are not going to get any back. The DSCC does not give a candidate the maximum allowed unless he or she has raised at least a certain amount for the DSCC.'); *infra* Findings ¶ 1.56.1 (statement of Senator Simpson).

Members also have an interest in a strong party that can assist its federal officeholders. *See, e.g.*, Bumpers Decl. ¶ 10 [DEV 6-Tab10] ('When a Member raises money for the party, there is a sense on the part of the Member that he or she is helping his or her own campaign by virtue of raising that money. When Members raise funds for the DNC, it helps the DNC perform its function of keeping tabs on statements, policies, and votes of opposition party members and groups.').

Former DNC and DSCC official and current lobbyist Robert Hickmott[52] testifies that even incumbents with safe

[52] In 1980, during President Carter's re-election campaign, Robert Hickmott worked at the Democratic National Committee ('DNC') as an Associate Finance Director. Hickmott Decl. ¶ 2 [DEV 6-Tab 19]. Following the general election, Hickmott became the Executive Director of a new DNC entity, the Democratic Business Council ('DBC'), where he served until 1983. *Id.* During 1985-86, Hickmott served as National Finance Director for then-Congressman Timothy Wirth's Senate campaign, and from 1987 until early 1989, on Senator Wirth's Senate staff. *Id.* After that, Hickmott was in private practice as an attorney until January 1991, when he joined the Democratic Senatorial Campaign Committee ('DSCC') as Deputy Executive Director. *Id.* In 1993, Hickmott worked for four years as the Associate Administrator for Congressional Affairs at the Unites States Environmental Protection Agency, then for two years as a counselor to then-Secretary Andrew Cuomo at the United States Department of Housing and Urban Development ('HUD'). *Id.* In 1999, Hickmott left HUD and joined The Smith- Free Group ('Smith-Free'), a small governmental affairs firm located in Washington, D.C. *Id.* ¶ 3. Hickmott is currently a Senior Vice President at Smith-Free and one of the six principals in the firm. *Id.* Hickmott is a regular contributor to candidates for Congress, for President, and the national party committees, primarily to Democratic candidates, but also to several Republicans, as well. *Id.* In the 1999-2000 cycle, he contributed just over $7,000 and in the 2001-2002 cycle, he has contributed a little more than $10,000. *Id.* Hickmott provided a declaration in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000), *rev'd*, 533 U.S. 431 (2001) ('Colorado II'); *See Colorado II*, 533 U.S. at 458.

seats have incentives to raise money for the parties. He explains:

> Incumbents who were not raising money for themselves because they were not up for reelection would sometimes raise money for other Senators, or for challengers. They would send $20,000 to the DSCC and ask that this be entered on another candidate's tally. They might do this, for example, if they were planning to run for a leadership position and wanted to obtain support from the Senators they assisted. This would personally benefit them, in addition to doing their part to retain Democratic control of the Senate, which would preserve the legislative power of all Democratic Senators.

Hickmott Decl., Ex. A ¶ 18 [DEV 6-Tab 19]; *see also id.* ¶ 13 (attesting that Senators were very concerned about whether or not donors' checks were tallied to them); *infra* Findings ¶ 1.56.3 (describing the DSCC tallying/credit system). Senator McCain attests that

> [t]he parties encourage Members of Congress to raise large amounts of soft money to benefit their own and others' re-election. At one recent caucus meeting, a Member of Congress was praised for raising $1.3 million dollars for the party. James Greenwood, a Republican Congressman from Pennsylvania, recently told the New York Times that House leaders con-

> sider soft money fundraising prowess in assigning chairmanships and other sought-after jobs. . . . I share Mr. Greenwood's concerns.

McCain Decl. ¶ 7 [DEV 8-Tab 29]. Finally, the political parties' power over Members of Congress provides additional incentive to fundraise for the national party committees. As Dr. Green notes: 'The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party.' Green Expert Report at 15 [DEV 1- Tab 3].

Nonfederal Funds are Given with Intent to Assist Specific Members of Congress; Political Parties Keep Track of Contributions Members of Congress Raise

1.56 Nonfederal money is often given to national parties with the intent that it will be used to assist the campaigns of particular federal candidates, and it is often used for that purpose.

1.56.1 Senator Simpson testifies that '[d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.' Simpson Decl. ¶ 6 [DEV 9-Tab 38]. 'Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates.' *Id.* ¶ 7. Senator Wirth[53] understood that when he raised funds

[53] Senator Timothy Wirth served in the U.S. House of Representatives from 1974 to 1986, representing the Second Congressional District of the State of Colorado. From 1987 through 1992 he served as Senator for the State of Colorado in the United States Senate. Wirth Decl. Ex. A ¶ 2 [DEV 9-Tab 43].

for the DSCC, donors expected that he would receive the amount of their donations multiplied by a certain number that the DSCC had predetermined, assuming that the DSCC had raised other funds. Wirth Decl. Ex. A ¶¶ 5, 8 [DEV 9-Tab 43]; *see also FEC v. Colorado Republican Fed. Campaign Comm.* ('*Colorado II*'), 533 U.S. 431 (2001); Bumpers Decl. ¶¶ 10-12 [DEV 6-Tab 10]; Simon Decl. ¶ 10 [DEV 9-Tab 37].

1.56.2 Individual nonfederal money donors have made specific requests that the national political party apply their nonfederal money gifts to particular federal campaigns. *See, e.g.*, RNC0035464 [DEV99], RNC0032733-34 [DEV 92] (fundraising letters requesting that nonfederal money donations be used for particular federal elections). As one experienced donor observes: 'The committee receiving . . . a soft money donation [solicited by a Member of Congress from a 'maxed out' contributor] understands that it has been raised by or for a particular federal candidate, and this affects how much the committee spends on behalf of that candidate. I have discussed with national party committees the spending of such soft money to benefit federal candidates.' Kirsch Decl. ¶ 8 [DEV 7-Tab 23]; *see also* Hiatt[54] Dep. at 114-18 (explaining that anyone donating nonfederal money is indirectly giving it to the campaigns of federal candidates and officeholders, and stating that his soft money donations were

[54] Arnold Hiatt engaged in substantial political spending for a number of years. He estimates that from the 1992 election cycle through 1997, he donated approximately $60,000 in federal funds, mostly to federal candidates, with a few contributions to federal political action committees ('PACs'). In October of 1996, he gave a $500,000 nonfederal donation to the DNC. In February of 2001, he made a $5000 hard money donation to the League of Conservation Voters' PAC, and believes that is the only hard money donation he has given since 1997. Hiatt Decl. ¶ 5 [DEV 6-Tab 18].

earmarked for particular candidates but that he does not know if the money was actually spent on those candidates).

1.56.2.1 Plaintiff Thomas McInerney, a large individual contributor to the Republican Party, states that he donated amounts in excess of $57,500 per election cycle to Republican organizations at the national, state and local levels. For example, in 2002, he donated $250,000 to the RNC, in addition to other donations to national, state and local political committees. He states that his donations were intended to support state and local candidates and political parties. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that 'it is his understanding' that they were used for such activities. *Id.* ¶¶ 11, 13, 15. Regardless of whether his donations were used for state and local political activities, the record is clear that Mr. McInerney represents an exception to the general rule that donors give money to the national parties with the intent that they will be used to assist federal candidates. Furthermore, if Mr. McInerney wants to donate funds to state parties for activities that affect state and local elections, nothing in BCRA prevents him from doing so. *See also infra* Findings ¶ 1.61.

1.56.3 The DSCC maintains a 'credit' program that credits nonfederal money raised by a Senator or candidate to that Senator or candidate's state party. Jordan Decl. ¶¶ 36-39 [DEV 7-Tab 21]. Amounts credited to a state party can reflect that the Senator or candidate solicited the donation, or can serve as a donor's sign of tacit support for the state party or the Senate candidate. Jordan Decl. ¶¶ 37-40, Tabs F, G [DEV 7-Tab 21]. According to former DSCC official Hickmott, Senators were very concerned about whether or not donors' checks were tallied to them. Hickmott Decl., Ex. A ¶ 13 [DEV 6-Tab 19]; *see also supra* Findings ¶ 1.55 (Senator Boren commenting on the tallying system and effect of a

candidate's fundraising for the national political committee on the support the candidate's campaign received from the national party).

1.56.4 Both the NRCC and NRSC are aware of which Members have raised funds for their committees, and may advise Members of amounts they have raised, in order to encourage Members to aid the collective interest of preserving or obtaining a majority in the House or Senate. McGahn Decl. ¶¶ 34-35 [DEV 8-Tab 30]; Vogel Decl. ¶¶ 33, 36 [DEV 9-Tab 41]. Similarly, although the DCCC uses 'no formal credit or tally program,' it 'advises Democratic House Members of the amounts they have raised for the DCCC, ascribing particular contributions to the fundraising efforts of the Member in question.' Wolfson Dec. ¶ 36 [DEV 9-Tab 44]; Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC 'provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress. . . . [a]t the Democratic Caucus meeting. . . . I think it's a method used to let people know that if the DCCC is going to be successful all members should participate.').

1.57 Federal candidates also raise nonfederal money through joint fundraising committees formed with national committees. *See* Buttenwieser Decl. ¶¶ 8-14 [DEV 6-Tab 11]. One common method of joint fundraising is for a national congressional committee to form a separate joint fundraising committee with a federal candidate committee. A joint fundraising committee collects and deposits contributions, pays related expenses, allocates proceeds and expenses to the participants, keeps required records, and discloses overall joint fundraising activity to the FEC. Wolfson Decl. ¶ 40 [DEV 9-Tab 44]; Vogel Decl. ¶¶ 39-45 [DEV 9-Tab 41]; Jordan Decl. ¶¶ 41, 50 [DEV 7-Tab 21]; Oliver Dep. at 258 [DEV Supp.-Tab 1].

> A typical allocation formula for joint fundraising between the [congressional campaign committees] and a federal candidate will allocate the first $2,000 of every contribution from an individual to the participating candidate, with $1,000 designated to the primary election and $1,000 to the general election; and the next $20,000 to the [congressional campaign committee's] federal account. Because the [congressional campaign committee] is normally the only participant eligible to receive nonfederal funds, any remaining amounts of an individual contribution will be allocated to the [congressional campaign committee's] nonfederal account, as will the entirety of any contribution from a federally prohibited source.

Wolfson Decl. ¶ 42 [DEV 9-Tab 44]; Vogel Decl. ¶ 41 [DEV 9-Tab 41]; Jordan Decl. ¶ 45 [DEV 7-Tab 21]. Two experts characterize the joint fundraising system as one 'in which Senate candidates in effect raise[] soft money for use in their own races.' Krasno and Sorauf Expert Report at 13 [DEV 1-Tab 2].

1.58 It is clear from the record that in practice Members of Congress actively solicit large nonfederal donations to their political parties, often at the behest and direction of the political parties. The political parties encourage Members to solicit such donations and reward those who are successful by assisting their campaigns. Furthermore, although the raising of nonfederal funds is rationalized as an effort to pay for 'party building' activities, it is clear that this money is solicited by Members and given by donors with the understanding that it will be used to assist the campaigns of particular federal candidates.

Federal Lawmakers and National Party Committees Solicit Nonfederal Funds for State Parties

1.59 National party committees direct donors to give nonfederal money to state parties in order to assist the

campaigns of federal candidates. *See, e.g.*, Kirsch Decl. ¶ 9 [DEV 7-Tab 23] ('The national Democratic party played an important role in my decisions to donate soft money to state parties in [the 2000 election] cycle, recommending that I donate funds to specific state parties just before the election. They said, essentially, if you want to help us out with the Presidential election, these particular state parties are hurting, they need money for get-out-the-vote and other last minute campaign activities.'). Robert Hickmott, a former DNC and DSCC official testifies:

> Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes come from a Member of Congress or his or her chief of staff. . . . Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in her or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19]; *see also* Buttenwieser Decl. ¶ 16 [DEV 6-Tab 11] ('The DSCC has also requested

that I provide assistance to state parties.'); Hassenfeld[55] Decl. ¶ 9 [DEV 6-Tab 17] ('In 1992, when I told the Democratic Party that I wanted to support then-Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. There appeared to be little difference between contributing directly to a candidate and making a donation to the party. Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state of Rhode Island. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign.'); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ('[N]ational committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns.'); Josefiak Decl. ¶ 68 [RNC Vol. I] ('It is . . . not uncommon for the RNC to put interested donors in touch with various state parties. This often occurs when a donor has reached his or her federal dollar limits to the RNC, but wishes to make additional contributions to the state party.

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[55] Alan G. Hassenfeld has served as Chairman of the Board and Chief Executive Officer of Hasbro, Inc. since 1989, a global company based in Rhode Island with annual revenues in excess of $3 billion. Hasbro designs, manufactures, and markets toys, games, interactive software, puzzles and infant products. He also sits on a number of civic and philanthropic boards. He is a member of the Board of Trustees of the University of Pennsylvania and Deerfield Academy, he serves on the Dean's Council of the Kennedy School of Government at Harvard, and sits on the board of Refugees International. He also run three charitable foundations: the Hasbro Charitable Trust, the Hasbro Children's Foundation. and a family foundation. Hassenfeld Decl. ¶¶ 2-3 [DEV 6-Tab 17].

When this happens, the RNC will often suggest that the donor make contributions to certain state parties that are most in need of funds at that time.').

1.60 Federal officeholders have directed contributors to the state parties when the contributors have 'maxed out' to the candidate or when it appears that the state party can most effectively use additional money to help that officeholder or other federal candidates. As one candidate's solicitation letter stated, 'you are at the limit of what you can directly contribute to my campaign,' but 'you can further help my campaign by assisting the Colorado Republican Party.' *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 458 (2001) (quoting an August 27, 1996 fundraising letter from then- Congressman Allard); *see also* Philp Dep. Ex. 14 [JDT Vol. 26] (same letter); MMc0014 [DEV 117-Tab 2] (letter to a contributor stating: 'Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000 program . . . . This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year' signed by Senator McConnell with the handwritten note: 'This is important to me. Hope you can help'); Buttenwieser Decl. ¶¶ 15-16 [DEV 6-Tab 11] ('Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states.'); Hickmott Decl. ¶ 8 [DEV 6-Tab 19] (quoted *supra* Findings ¶ 1.59); Randlett Decl. ¶ 9 [DEV 8-Tab 32] ('Members [of Congress] . . . have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns.').

1.61 Plaintiff Thomas McInerney states that he donates over $10,000 per year to state and local political party organizations to be spent on state and local organizations and elections. McInerney Aff. ¶¶ 4, 10, 12 [9 PCS]. Mr. McInerney's affidavit does not state whether or not these funds were used in the manner he desired, only that 'it is his understanding' that they were used for such activities. *Id.* ¶¶ 11, 13, 15. Regardless, nothing in BCRA prevents Mr. McInerney from donating funds to state and local party organizations—the law only restricts the types of activities on which these nonfederal funds may be spent. However, if Mr. McInerney's purpose in donating these funds is to assist state and local parties and candidates, BCRA ensures that his funds will be spent only on activities that exclusively affect state and local parties and elections, and not on practices that constitute federal election activity.

Summary

1.62 The evidence clearly demonstrates that federal officeholders not only solicit nonfederal donations for the national political committees, but also for state political parties. The testimony and documentary evidence makes clear that candidates value such donations almost as much as donations made directly to their campaigns and that these donations assist federal candidates' campaigns. Furthermore, the evidence makes clear that the national parties also direct nonfederal donations to their state party affiliates for the purpose of affecting federal elections. This evidence also corroborates the findings that GOTV and voter registration efforts by state parties affect federal elections. *See, e.g., supra* Findings ¶¶ 1.28, 1.31. Most importantly, the close nexus between the national political parties and federal officeholders led BCRA's framers to conclude that:

> Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process. The only effective way to address this [soft money] problem of corruption is to ban entirely all raising and spending of soft money by the national parties.

148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

Corruption

1.63 The fact that Members of Congress are intimately involved in the raising of money for the political parties, particularly unlimited nonfederal money donations, creates opportunities for corruption. The record does not contain any evidence of bribery or vote buying in exchange for donations of nonfederal money; however, the evidence presented in this case convincingly demonstrates that large contributions, particularly those nonfederal contributions surpassing the federal limits, provide donors access to federal lawmakers which is a critical ingredient for influencing legislation, and which the Supreme Court has determined constitutes corruption. *See Buckley v. Valeo*, 424 U.S. 1, 27 n.28 (1976) (citing *Buckley*, 519 F.2d at 839 nn.37-38).

Vote Buying/Bribery

1.64 No Member of Congress testifying in this case states that he or she has ever changed his or her vote on any legislation in exchange for a donation of nonfederal funds to his or her political party. *See, e.g.*, Resp. of FEC to RNC's First and Second Reqs. for Admis. at 2-3 (admitting lack of evidence); McCain Dep. at 171-74 (unable to identify any federal officeholder who changed his or her vote on any legislation in exchange for a donation of non-federal money to a political party); Snowe Dep. at 15-16 (same); Jeffords Dep. at 106- 07 (same); Meehan Dep. at 181-83 (same); Shays Dep. at 171

(same); *see also* 148 Cong. Rec. S2099 (daily ed. March 20, 2002) (statement of Sen. Dodd) ('I have never known of a particular Member whom [sic] I thought cast a ballot because of a contribution.'); 147 Cong. Rec. S2936 (daily ed. March 27, 2001) (statement of Sen. Wellstone) ('I don't know of any individual wrongdoing by any Senator of either party.').

1.65 Senator Rudman notes:

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.

Rudman Decl. ¶ 10 [DEV 8-Tab 34].

1.66 Consistent with Senator Rudman's testimony, the record, while not containing evidence that nonfederal funds have purchased votes, includes testimony from former and current Members of Congress describing the influence of nonfederal funds on the political system. Former Senator Simpson states:

> Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about—and quite possibly votes on—an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.

Simpson Decl. ¶ 10. Senator Simpson also relates that

> Large donors of both hard and soft money receive special treatment. No matter how busy a politician may

> be during the day, he or she will always make time to see donors who gave large amounts of money. Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.

Id. ¶ 9. Former Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. I do not think there is any question that this is the reason it passed.

Simon Decl. ¶¶ 13-14 [DEV 9-Tab 37]; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon); Feingold Dep. at 62 [JDT Vol. 6] (testifying that in the fall of 1996 a senior Senator suggested to Senator Feingold that he

support the Federal Express amendment because 'they just gave us $100,000'). Former Senator Boren testifies:

> Donations, including soft money donations to political parties, do affect how Congress operates. It's only natural, and happens all too often, that a busy Senator with 10 minutes to spare will spend those minutes returning the call of a large soft money donor rather than the call of any other constituent. . . .
>
> As a Member of the Senate Finance Committee, I experienced the pressure first hand. On several occasions when we were debating important tax bills, I needed a police escort to get into the Finance Committee hearing room because so many lobbyists were crowding the halls, trying to get one last chance to make their pitch to each Senator. Senators generally knew which lobbyist represented the interests of which large donor. I was often glad that I limited the amount of soft money fundraising I did and did not take PAC contributions, because it would be extremely difficult not to feel beholden to these donors otherwise. I know from my first-hand experience and from my interactions with other Senators that they did feel beholden to large donors.

Senator Boren Decl. ¶¶ 7-8 [DEV 6-Tab 8]; *see also id.* ¶ 9 ('Many Congressmen vie for positions on particular committees such as Finance and Ways and Means in large part because it makes it much easier for them to raise money. They then spend large amounts of their scarce time raising money for their party from businesses that have specific matters pending before their committees.').

1.67 It is clear that political parties are involved in efforts to influence federal officeholders with regard to the passage or defeat of specific legislation. The motivation behind these efforts may not be imparted to the officeholder. However, an

internal document shows that on at least one occasion the motivation for doing so was associated with donors' interest in the legislation.

1.67.1 Senator Rudman testifies that while the RNC would lobby him to take a position on legislation, it never asked him to take a particular position because a donor had contributed soft money to the party. Rudman Dep. at 77-82 [JDT Vol. 27]. Senator McCain testifies that 'there are many times where the Republican National Committee tried to change my votes and other votes of other Republicans . . . [T]he Republican National Committee constantly weighs in on legislation before the Congress of the United States,' McCain Dep. at 171-72 [JDT Vol. 18], but he also states that he does not 'know [if it was] in exchange for donations not.' *Id.* The record, however, also contains a call sheet titled 'Team 100 One-On-One with [a national association],' for a call that took place on February 28, 2000, in Chairman Jim Nicholson's office. RNC0159740 [DEV 95]. Included on the sheet were instructions to thank the group for upgrading to Team 100. *Id.* The call sheet includes handwritten comments, including: 'Gary Miller sponsoring Brownfield Legislation. Boehlert + Bliley against. Working w/ Speaker. Asked JN help. JN agreed to talk to Boehlert @ the possible time. When appropriate. . . . Call Sen. Abraham about support homebuilders—Property Rights Bill . . . . Lott good friend of homebuilders.' *Id.*

1.68 Although one Defense expert believes it does not occur, two present Members of Congress testify that threats have been made by the political parties to withhold financial support due to Members' positions on issues. *See* Shays Dep. at 172-84 [JDT Vol. 29] (stating Republican Party never attempted to change his vote, but that '[i]t was made clear to a number of my colleagues if they voted for the campaign finance reform, they would get no campaign contributions'); McCain Decl. ¶ 7 [DEV 8-Tab 29] ('At times, when

Members seek to support legislation their congressional leaders oppose, they are threatened with the prospect that their leaders will withhold soft money being spent on their behalf.'); Defense Expert Mann Cross Exam. at 113-15 [JDT Vol. 17] ('I would be shocked if [the RNC] ever did such a thing. . . . [T]he point is to win the margin seat, to control the majority for the party, not to weaken a potentially vulnerable candidate. . . . It would be self-defeating. That isn't how it works.'). The FEC does not investigate or make determinations of national parties using federal money to induce federal legislators to support or oppose specific legislation, and therefore has no knowledge of whether such practices occur. Vosdingh Dep. at 89 [RNC Vol. VIII].

1.69 Plaintiffs' own expert Raymond La Raja recognizes the corruption potential inherent in nonfederal donations to the political parties. In a recently published book, La Raja argues that limiting nonfederal money donations reduces 'the potential for corruption by eliminating the super donors.' Green Rebuttal Report at 4 [DEV 5-Tab 1] (quoting Raymond La Raja, Sources and Uses of Soft Money: What Do We Know?, *in* A User's Guide to Campaign Reform at 106 (Gerald C. Lubenow ed., 2001). He continues:

> If only a modest portion of party soft money goes to fund issue ads, it is worth re-examining the question: how is soft money harmful? The obvious answer is that it permits candidates, contributors, and parties, to circumvent federal laws limiting campaign contributions. If party soft money can help a specific candidate, then corporations, unions, or wealthy individuals can simply funnel contributions to candidates through the parties. And the potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution.

Id. (citing same at 105). In fact, La Raja asserts that '[t]o reduce the potential for corruption, I recommend that

Congress place a cap on soft money contributions or, if soft money is banned, raise the limits on hard money contributions.' *Id.* (citing same at 106). In his dissertation, La Raja makes a similar recommendation. La Raja Cross Exam. Ex. 3 at 147 [JDT Vol. 15]; *see also id.* at 105 ('In a society in which political participation is unequal among socio-economic groups it is discomforting to think that wealthy people and organizations might have disproportionate influence on government policies simply because they can write large checks to politicians. For this reason alone, policy-makers might pause before granting dispensations to political parties though these institutions may perform valuable functions in democratic politics.'). La Raja concludes that

> [t]here are two distinct benefits of using soft money. First, the parties can raise these funds in large increments. Although most soft money contributions are relatively small—the average per source is less than $10,000—the parties solicit large amounts from corporations, unions and wealthy individuals. . . .
>
> Another important advantage of soft money is that the parties can concentrate these funds in key races. *By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests.* To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Id. at 51 (emphasis added); *see also id.* at 74-75 (concluding that parties 'exploit federal campaign finance laws by using soft money for candidate support even though federal laws require them to use it for generic party building'); La Raja Cross Exam. 17-18 [JDT Vol. 15] (stating that he stands by the conclusions reached in his dissertation).

Donors are Pressured to Make Contributions to Political Parties

1.70 Corporate donors, trade associations, and individual donors are pressured to make large contributions to the parties.

1.70.1 The Committee for Economic Development (CED)[56] released a 'survey, which was conducted by the Tarrance Group, . . . drawn from telephone interviews of a random sample of 300 corporate executives employed by major U.S. corporations.' Kolb[57] Decl. ¶ 9 [DEV 7-Tab 24]. The survey showed that '[n]early three-quarters of [senior executives of the nation's largest businesses] (74 percent) say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers. Seventy five percent say political donations give them an advantage in shaping legislation; and nearly four-in-five executives (78 percent) called the system 'an arms race for cash that continues to get more and more out of control.'' *Id.* ¶ 9 & Ex. 6.

1.70.1.1 Plaintiffs challenge these poll results, noting that Kolb, CED's President, could not provide details regarding how the Tarrance Group conducted the survey. *See* Proposed Findings of Fact of the RNC, Republican Party of Colorado, the Republican Party of Ohio, the Republican Party of New Mexico, the Dallas County (Iowa) Republican County Central Committee, and Mike Duncan ('RNC Proposed Findings') ¶ 115(b) (citing Kolb Dep. at 128, 145 [JDT Vol. 13]). They also state that many of the survey questions did not distinguish between federal and nonfederal funds. *Id.* (citing

[56] CED is 'an independent non-partisan research and policy organization of some 200 Trustees who are prominent business leaders and educators.' Kolb Decl. I ¶ 1 [DEV-Tab 24].

[57] Charles Kolb is CED's president. Kolb Decl. I ¶ 1 [DEV 7-Tab 24].

Kolb Dep. Ex. 5). With regard to the first criticism, the fact that a person who commissioned a study could not explain how the polling firm actually conducted the survey, without more, does not render the poll flawed. Plaintiffs have provided no information which indicates that the Court should view the Tarrance Group's work with caution. In fact, in his deposition, Kolb explained that the Tarrance Group is 'a professional polling firm. They know how to do their business pretty well and they're fairly well respected from everything we could tell,' Kolb Dep. at 145 [JDT Vol. 13], and the RNC did not challenge this assessment in the deposition or in their filings. In fact, the record shows that The Coalition- an organization supported by a number of Plaintiffs-used the Tarrance Group for its own polling. *See infra* Findings ¶ 2.6.2.2. As for the second criticism, it is true that the pollsters did not ask those surveyed to distinguish between federal and nonfederal funds; however, the fact that nearly 80 percent called the campaign finance system 'an arms race for cash that continues to get more and more out of control' strongly suggests that political party contribution coercion does not stop once a donor reaches the federal contribution limits.

1.70.2 Lobbyist Robert Rozen testifies that

> [i]n some cases corporations and trade associations do not want to give in amounts over the hard money limits, but they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Rozen Decl. ¶ 8 [DEV 8-Tab 33]; *see also* Brian McGrory, Businesses Drawn to Campaign Reform, Boston Globe,

February 13, 1997, ODP0018-00457-60 [DEV 69-Tab 48] (quoting Howard Marlowe, a Washington lobbyist, as saying: 'We are spending tens of millions of dollars to satisfy the constant craving of congressmen or the parties for money and our own craving for access. . . . You don't know if you say 'no'—and you may have given five times already—whether they will shut off the access you have been buying with all these other contributions. We need the access.').

1.70.3 A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283 [DEV 45-Tab 110]. Eighty percent of respondents agreed that 'office-holders regularly pressure donors for contributions,' while one-half agreed 'that contributors regularly pressure office-holders for favors and seek access to government.' *Id.* at 0290.

1.70.4 Former Senator Boren testifies that 'Donors . . . feel victimized. Now that I've left office, I sometimes hear from large donors that they feel 'shaken down.'' Boren Decl. ¶ 10.

Federal Officeholders' Awareness of Who Donates to Parties

1.71 Some present and past officeholders, corroborated by separate documentary evidence, testify that many in Congress are aware of the identities of contributors of large donations to the political parties. Some officeholders testify that they personally are unaware of who donates to the political parties, but they are mostly BCRA co-sponsors, aligned against these types of large, unregulated contributions and not active participants in nonfederal fundraising, or Members who have distanced themselves from receiving this information.

1.71.1 Some Members of Congress testifying in this case state that they *personally* are unaware of who donates money

to their parties. *See* Feingold Dep. at 115-16 [JDT Vol. 6] ('Q: How generally are . . . Senators made aware of, if at all, the amounts and identities of soft money donors to the national committees? A: I don't know exactly how that's done or how much it's done.'): Snowe Dep. at 223-24 [JDT Vol. 31] (unaware of nonfederal donors to the RNC); Jeffords Dep. at 96 [JDT Vol. 11] ('somewhat' aware of nonfederal donors to the national political parties); Meehan Dep. at 179 [JDT Vol. 22] (aware of few nonfederal donors to national party committees, only because 'from time to time I read who they are in the newspaper'). The record shows that when Members do not know the identity of contributors, it is sometimes because those officeholders made a conscious effort to remain unaware or that their staff handled such information. *See, e.g.*, Senator Feingold Dep. at 115 [JDT Vol. 6] (explaining that while he does not know how Senators are made aware of the identity of donors of nonfederal money to national parties, it is because he 'made a real effort to be far away from that part of the process so [he is] not privy to or aware of exactly how that's done and to what extent it's done.'); Congressman Meehan Dep. at 178-79 [JDT Vol. 22] (explaining that he was unaware of the Democratic National Committee's 'tallying' process, by which the amount of money the DNC spends on a particular candidate is related to the amount of nonfederal money that candidate raised for the DNC, but that he was 'probably one of the last people that they would let know about the tallying process'); Rudman Dep. at 75-78 [JDT Vol. 27] (explaining that while he did not know the identity of contributors who donated 'either hard or soft money' to the RNC, that the RNC 'probably' provided him with that information but he 'didn't have any interest in it. I was the most disinterested candidate in money of anyone you've probably ever run into. . . . And [if such reports] came to the office, the [administrative assistant] took them and probably read them.').

Senator McConnell has stated that during his 18 years in the United States Senate he has met thousands of Americans with whom he has shaken hands, posed for photographs, answered questions and discussed legislative issues. The overwhelming majority of these meetings were with people who do not donate funds to the Republican Party at the national, state, or local level. Senator McConnell also states that he is typically unaware of the donation history of individuals with whom he meets. McConnell Aff. ¶ 13 [2 PCS]. While Senator McConnell may generally not be aware of the donation history of each of the individuals he meets, he is aware of the donation history of some specific large donors. For example, Senator McConnell sent the following letter to a contributor which stated in part:

> It was a pleasure seeing you at the Senate-House Dinner last week. The dinner was not a good time to talk, but I wanted to let you know about the August 12 fundraiser I am having at your neighbor['s] . . . home. . . .
>
> In addition to your $2,000 contribution in the last election cycle, I was proud to also receive $1,000 each from [five other donors]. Their support again would be greatly appreciated.

McConnell Dep. Ex. 11 [JDT Vol. 19] (MMc0987). The letter is signed 'Mitch' and includes the following handwritten note: 'As you may recall, any contributions to my '02 campaign will count against your $25,000 annual hard money limit in '02 + not '99. Hope you can help.' *Id.*

Another handwritten letter states: 'Thanks so much for your continuing friendship and support. Your commitment for $2000 each from you + your lady will be very helpful in my reelection next year. Thanks again + I look forward to hearing from you soon. Mitch.' *Id.* Ex. 5 (MMc0753); *see also* Findings ¶ 1.60 (letter to contributor noting that he had given the maximum amount of federal funds to Senator McConnell's campaign); McConnell Dep. at 38-41 [JDT Vol. 19] (explaining that a particular company collected $47,000 for his campaign because its chairman, who is a friend of Senator McConnell's, hosted a fundraiser for the McConnell campaign)

1.71.2 Many others testify that federal officeholders and candidates are typically aware of who donates to their parties. Former and current Members of Congress state that they and their colleagues are aware of who makes large contributions to their parties. *See, e.g.*, Bumpers Decl. ¶¶ 18, 20 [DEV 6-Tab 10] (explaining that officeholders of both parties are aware of contributors' identities, that he had 'heard that some Members even keep lists of big donors in their offices,' and that 'you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party. If someone in Arkansas gave $50,000 to the DNC, for example, I would certainly know that.'); 148 Cong Rec. H352 (daily ed. Feb. 13, 2002) (statement of Rep. Shays) (recognizing that 'it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect. Candidates not only solicit these funds themselves, they meet with big donors who have important issues pending before the government; and sometimes, the candidates' or the party's position appear to change after such meetings.'); Senator Simpson Decl. ¶ 5 [DEV 9-Tab 38] (explaining that '[p]arty leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.'); Senator Boren Decl. ¶ 6 [DEV 6-Tab 8] (testifying that '[e]ach Senator knows who the biggest donors to the party are' because '[d]onors often prefer to hand their [non-

federal money contribution] checks to the Senator personally, or their lobbyist informs the Senator that a large donation was just made.'); Congressman Bennie G. Thompson Dep. at 28-29 [JDT Vol. 32] (testifying that the DCCC 'provide[s] the entire Democratic Caucus with the amounts of money raised by name of every Democratic member of Congress.'); McCain Decl. ¶ 6 [DEV 8-Tab 29] ('Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money,' and '[d]onors or their lobbyists often inform a particular Senator that they have made a large donation.'); Senator Simon Decl. ¶ 16 [DEV 9-Tab 37] (stating that he was more likely to first return the telephone call of a donor to his campaign than someone who had not donated, and that increased access for those who give large contributions to the party is not fair to those who cannot afford to give contributions at all); Wirth Decl. Ex. A ¶ 17 [DEV 9-Tab 43] ('[C]andidates were generally aware of the sources of the funds that enabled the party committee to support their campaigns.').

Party officials and a political donor state that Members of Congress are made aware of who makes large donations to their party. Vogel Decl. ¶¶ 25-28 [DEV 9-Tab 41] (explaining that the NRSC distributes lists of potential donors to incumbents so that they can solicit donations); McGahn Decl. ¶¶ 21, 34-37 [DEV 8-Tab 30] (same for NRCC); Jordan Decl. ¶¶ 20, 25-28 [DEV 7-Tab 21] (same for DSCC); Wolfson Decl. ¶¶ 21, 28-31 [DEV 9-Tab 44] (same for DCCC); Randlett Decl. ¶ 10 [DEV 8-Tab 32] ('Information about what soft money donors have given travels among the Members in different ways. Obviously the Member who solicited the money knows. Members also know who is involved with the various major donor events which they attend, such as retreats, meetings and conference calls. And there is communication among Members about who has made soft money donations and at what level they have given, and

this is widely known and understood by the Members and their staff.').

1.71.3 The record also contains evidence showing that sometimes large donors make their identities known to Members of Congress. This memorandum from a large, influential interest group consisting of major corporations from a particular industry, discusses an upcoming meeting between the group's representatives and Senator McConnell, then head of the NRSC. [citation sealed]. The 'objectives' of the meeting included 'apprising him of [sic] industry's concern with attention on' an issue directly related to their industry and 'expressing [the group's] willingness to be a resource, substantively and politically, to assist in maintaining a Republican majority in 2000.' *Id; see also* Findings ¶¶ 1.75.1 (testimony about donors choosing to personally deliver donations to Senator Chuck Robb when he was Chairman of the DSCC), 1.75.2 (Senator McCain statement: 'Donors or their lobbyists often inform a particular Senator that they have made a large donation.'), 1.75.2 (statement by Sen. McCain).

1.72 It is clear from the evidence *supra* that many Members of Congress know who donates to their political parties, and that those who do not can easily find such information. In fact the record suggests that for a Member not to know the identities of these donors, he or she must actively avoid such knowledge as it is provided by the national political parties and the donors themselves. This finding is not particularly unexpected given that many Members of Congress actively solicit federal and nonfederal contributions for their parties. *See supra* Findings ¶ 1.51.

The fact that some Members know who donates large amounts of money to their political parties is a necessary corollary to the next set of findings which demonstrates that many who give large donations to the political parties, particularly unrestricted nonfederal donations, are provided

with access to federal lawmakers. This access provides these donors with the opportunity to influence legislation.

Evidence Regarding Contributions and Access to Federal Lawmakers

1.73 The record contains a substantial amount of evidence showing that large donations to the political parties, particularly nonfederal contributions, provide donors with special access to federal lawmakers. This access is valued by contributors because access to lawmakers is a necessary ingredient for influencing the legislative process. Contributors find that nonfederal funds are most effective at obtaining special access, and to ensure that they maintain this access donors contribute to both political parties. The political parties take advantage of contributors' desire for access by structuring their donor programs so that as donations increase, so do the number and intimacy of special opportunities to meet with Members of Congress. The facts below make clear that this effect of nonfederal donations corrupts the political system.

Donors Give Nonfederal Donations in Order to Obtain Special Access to Federal Lawmakers

1.74 Testimony in the record from lobbyists, Members of Congress, and individual and corporate donors, demonstrates that major contributors to the political parties give nonfederal donations for the purpose of obtaining increased access to, and strengthening their relationships with federal officeholders.

1.74.1 Lobbyists state that their clients make donations to political parties to achieve access. According to lobbyist, and former DNC and DSCC official, Robert Hickmott '[t]here is a very rare strata of contributors who contribute large amounts to the DSCC because they actually believe in Democratic politics. . . . The majority of those who contribute to political parties do so for business reasons, to gain access to influential

Members of Congress and to get to know new Members.' Hickmott Decl., Ex. A. ¶ 46 [DEV 6-Tab 19]; *see also* Rozen Decl. ¶ 10 ('[L]arge political contributions are worthwhile because of the potential benefit to the company's bottom line.') [DEV 8-Tab 33]; Andrews[58] Decl. ¶ 8 (stating that sophisticated political donors 'typically are trying to wisely invest their resources to maximize political return.') [DEV 6-Tab 1]. Wright Andrews explains:

> Sophisticated political donors—particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups—are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected

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[58] Mr. Andrews is an attorney and lobbyist at the Washington, D.C. firm of Butera & Andrews, specializing in government relations and federal legislative representations. He has been an active lobbyist before Congress since 1975. Prior to that time, he served as Chief Legislative Assistant to then United States Senator Sam Nunn. Prior to forming Butera & Andrews, he worked in the government relations practice at the Washington office of the law firm of Sutherland, Asbill & Brennan. During his career, he has represented clients from throughout the nation and abroad, and they have included major corporations, trade associations, coalitions, and state governmental entities. He has worked with clients on a broad array of issues including environmental matters, federal taxation, banking, financial services, housing, and many others. He has served two terms as President of the American League of Lobbyists, and Washingtonian magazine named him as [sic] of 'Washington's Top 50 Lobbyists.' Andrews Decl. ¶ 1 [DEV 6-Tab 1]

> officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Andrews Decl. ¶ 8 [DEV 6-Tab 1]. Lobbyist Robert Rozen testifies that

> [t]ypically, a contributor gives money to establish relationships, to be able to lobby on an issue, to get close to Members, to be able to have influence. While an elected official of course does not have to do something because somebody gave, a contribution helps establish a relationship, and the more you give the better the relationship. It is not that legislation is being written in direct response to somebody giving a lot of money. Rather, it is one step removed: relationships are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship.

Rozen Decl., Ex. A ¶ 12 [DEV 8-Tab 33].

1.74.2 Some former and current Members of Congress testify that donors expect to establish relationships with officeholders in return for their nonfederal donations to the national political parties. Former Senator Rudman explains:

> By and large, the business world, including corporations and unions, gives money to political parties... [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions. The same is true in the preponderance of cases where wealthy individuals give

> $50,000, $100,000, $250,000, or even more to political parties in soft money donations.').

Rudman Decl. ¶ 5 [DEV 8-Tab 34]; *see also* Bumpers Decl. ¶ 14 [DEV 6-Tab 10] ('Although some donors give to Members and parties simply because they support a particular party or Member, the lion's share of money is given because people want access. If someone gives money to a party, out of friendship with a Member, that donor may never ask for anything in return. However, although many people give money with no present intention of asking for anything in return, they know that if they ever need access they can probably get it. Donations can thus serve as a type of insurance.'); *id.* ¶ 13 (testifying that people give money to party committees feel that they are 'ingratiating themselves' with the federal officeholder who solicits the donation); Wirth Decl., Ex. A. ¶ 5 [DEV 9-Tab 43] (stating that those donors who made contributions to the state party 'almost always did so because they expected that the contributions would support my campaign,' and that, generally, 'they expected that [the Senator] would remember their contributions.'); Brock Decl. ¶ 5(a) [DEV 6-Tab 9] (testifying that large givers 'for their part, feel they have a 'call' on these officials. Corporations, unions, and wealthy individuals give these large amounts of money to political parties so they can improve their access to and influence over elected party members. Elected officials who raise soft money know this.'); Boren Decl. ¶ 9 [DEV 6-Tab 8] ('[Members of Congress] know exactly why most soft money donors give—to get access and special influence based on their contributions.').

1.74.3 Business contributors also testify that nonfederal donations to parties are made to obtain access to federal officeholders. Roger Tamraz, an American businessman involved in investment banking and international energy projects, made donations to the DNC during the 1996 election cycle. When asked during Congressional hearings whether

one of the reasons he made the contributions was because he 'believed it might get [him] access?,' Mr. Tamraz responded: 'Senator, I'm going even farther. It's the only reason-to get access. . . .' Thompson Comm. Report at 2913 n.46 (quoting page 63 of Mr. Tamraz's testimony before the committee). Some corporate donors view nonfederal donations as the cost of doing business. *See* Hassenfeld Decl. ¶ 16 ('Many in the corporate world view large soft money donations as a cost of doing business, and frankly, a good investment relative to the potential economic benefit to their business. . . . I remain convinced that in some of the more publicized cases, federal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses.') [DEV 6- Tab 17]; Randlett Decl. ¶ 5 [DEV 8-Tab 32] (stating that 'many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction. Some soft money donors give $250,000, $500,000, or more, year after year, in order to achieve these goals. For most institutional donors, if you're going to put that much money in, you need to see a return, just as though you were investing in a corporation or some other economic venture.'); *see also* Kirsch Decl. ¶ 14 (stating that '[major] donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.') [DEV 7-Tab 23].

Documents submitted show that a Fortune 100 company makes large contributions to national party committees with the expectation that its contributions will cultivate or strengthen its 'relationships' with particular Members of Congress. *See, e.g.*, Internal Fortune 100 company memorandum entitled 'Justification for donation to [DSCC]' (October 25, 2000) [citation sealed] ('I am requesting a check for

$50,000.00 to the Democratic Senatorial Campaign Committee (DSCC). Senator Robert Torricelli is the chairman for the DSCC and in a recent conversation with the Senator, he requested the above amount from [our company]. Senator Torricelli has been a friend to [our company] for many years and he has shown himself to be a thoughtful voice regarding issues in our industry. He currently serves on the Judiciary, Foreign Relations & Governmental Affairs and Rules and Administration Committees. I feel this would be a great opportunity to strengthen our relationship with Senator Torricelli and the DSCC.'); Internal Fortune 100 company memorandum entitled 'Justification for donation to [DSCC]' (December 12, 2000) [citation sealed] ('I am requesting a check in the amount of $50,000 to the Democratic Senatorial Campaign Committee (DSCC). Senator Patty Murray (D-WA) is the new chairman of the DSCC . . . . Senator Murray sits on the Senate Committees on Appropriations, Budget, Health, Education, Labor and Pensions, and Veterans Affairs. This donation would further enhance our ties with the DSCC and get our relationship with Senator Murray off to a good start.'); Internal Fortune 100 company memorandum entitled '[DCCC]/Congressman Bill Luther' (May 7, 2001) [citation sealed] ('I am requesting a check for $25,000.00 to the [DCCC] to support party building activities in response to a request from Congressman Bill Luther. Congressman Luther has been a friend to [our company] for many years . . . . He currently serves on the Commerce Committee, the Subcommittees for Telecommunications, Trade & Consumer Protection as well as the Finance and Hazardous Materials. I feel this would be a great opportunity to strengthen our relationship with Congressman Luther.'); Internal Fortune 100 company memorandum entitled 'Georgia Senate 2002' (July 19, 2001) [citation sealed] ('I am requesting a check for $10,000.00 on behalf of Georgia Senate 2002. Senator Cleland has been reaching out to his key supporters and he has contacted [our company] for financial assistance with

Georgia Senate 2002. This is very important to Senator Max Cleland and over the years, Senator Cleland has been a good friend to [our company]. I feel this would be a great opportunity to strengthen our relationship with Senator Cleland.'). One legislative advocate from this company described the benefits reaped from contributing $100,000 to the NRCC: 'I think we established some goodwill with [Congressman] Tauzin, both by [our company] contributing at the $100,000 level to the NRCC dinner he chaired last month and by my participation in the NRCC Finance Committee for the dinner. Tauzin understood that [our company] participated at the same level as the major . . . companies [in our industry] did, and he expressed genuine interest in trying to begin to reach out to the competitive industry. In sum, I think the event was a real positive for [our company].' Internal Fortune 100 company memorandum entitled'NRCC Leadership Dinner 2000,' dated April 4, 2000, [citation sealed].

An internal RNC document also shows that donors often give to the national parties to achieve access to lawmakers. RNC0177216 [DEV 95] (note written on stationery of RNC's Team 100 Director, Haley Barbour, stating 'they have pretty much decided to join T-100 . . . . They want access to political players . . . . Their top issue is tort reform').

1.74.4 One experienced individual donor testifies that '[l]arge soft money donors give in order to obtain access and influence.' Hiatt Decl. ¶ 11 [DEV 6- Tab 18].

1.74.5 Plaintiffs' expert La Raja testifies that interest groups probably pursue an access strategy when they give money to political parties. La Raja Cross Exam. at 89 [JDT Vol. 15].

Large Nonfederal Donations Provide Donors Access to Federal Lawmakers

1.75 The record demonstrates that large donations, especially nonfederal contributions, to the political parties provide

donors with access to Members of Congress. The record is a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized. As one former Member of Congress puts it: '[A]ccess is it. Access is power. Access is clout.' Boren Decl. ¶ 7 [DEV 6-Tab 8] (quoting Rep. Mazzoli). 1.75.1 Testimony from lobbyists demonstrates that large donations, particularly in nonfederal form, are a necessary ingredient for a successful lobbying campaign because they provide their clients with access to federal lawmakers, which allows them to influence legislation.

Lobbyist Robert Rozen testifies that large nonfederal donations are essential for developing relationships with Members of Congress, which in turn lead to access, which in turn lead to influence over policy.

> I know of organizations who believe that to be treated seriously in Washington, and by that I mean to be a player and to have access, you need to give soft money. As a result, many organizations do give soft money. . . . They give soft money because they believe that's what helps establish better contacts with Members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interests before particular committees need to have access to the chairman of that committee, make donations, and go to events where the chairman will be. Even if that chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can't be sure so they want to play it safe and make soft money

> contributions. The large contributions enable them to establish relationships, and that increases the chances they'll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company's bottom line.

Rozen Decl. ¶ 10 [DEV 8-Tab 33]; *see also id.* ¶ 14 ('You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone—that is, write a larger check—and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings: the Member has received a favor and feels a natural obligation to be helpful in return. This is how human relationships work. The legislative arena is the same as other areas of commerce and life. It is similar to a situation that has been in the news recently: an investment banking firm made shares of hot initial public offerings available to the officers of Worldcom Inc., while Worldcom Inc. executives were giving the firm tens of millions of dollars in investment-banking business. There doesn't have to be a specific tie-in to achieve the result.').

Lobbyist Robert Hickmott, who is a former DNC and DSCC official, testifies that he advises his clients to make contributions in order to 'establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship.' Hickmott Dep. at 50 [JDT Vol. 10]. Hickmott testifies that when Senator Robb was chairman of the DSCC he would go to the DSCC offices where he would 'accept checks from individuals or organizations who wanted to give money to the DSCC and they wanted face time with Chairman Chuck Robb.' *Id.* at 94-95. Donors would 'use this as an opportunity not only to make a contribution to the DSCC, but also to convey to Senator Robb what their group or individual position was on an issue.' *Id.* at 95.

Lobbyist Daniel Murray's testimony in a prior case, which has been incorporated into the record of this case, states that

> contribut[ing] soft money . . . has proven to provide excellent access to federal officials and to candidates for federal elective office. Since the amount of soft money that an individual, corporation or other entity may contribute has no limit, soft money has become the favored method of supplying political support. . . . [S]oft money begets both access to law-makers and membership in groups which provide ever greater access and opportunity to influence.

Murray Aff. in *Mariani* ¶ 14 [DEV 79-Tab 59].

1.75.1.1 Although there are varying views as to whether lobbying efforts are a more effective means of achieving access to federal officeholders than large nonfederal contributions, there is no dispute that large nonfederal contributions provide an additional means of obtaining access to officeholders and are generally part of modern lobbying plans. While one lobbyist concedes that his clients hire him because he is able to provide them access to lawmakers regardless of the client's donation history, one of the ways he is able to provide this service is through nonfederal donations he and his firm arrange for Members of Congress and their political parties. Moreover, Plaintiffs have not presented the testimony of a single lobbyist who believes that nonfederal money donations do not assist clients in their efforts to gain access to influence federal lawmakers.

1.75.1.2 Some testimony presents lobbying as a more effective method of obtaining access to federal lawmakers than nonfederal donations. *See* RNC Finance Director B. Shea Decl. ¶ 45 [RNC Vol. V] ('It is obvious why major

donors to the RNC do not regularly use their donations as a means to obtain 'access.' All or virtually all who have personal or organizational business with the federal government retain or employ professional lobbyists.'); Former Senator Bumpers Dep. in *RNC* at 39 [DEV 63-Tab 1] ('[M]oney really does buy access . . . . [a]t some level that's true of campaign contributions, and it's almost always true in the cases of lobbying') *but see infra* Findings ¶ 1.75.2 (Former Senators Rudman, Boren and Simpson's views on access). Evidence was also presented that many entities that donate nonfederal funds to political parties also spend vast sums of money lobbying federal officeholders, sometimes exceeding their donations by many multiples. *See* Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24 (admitting that top five corporate nonfederal donors during the 1996 election campaign donated $9,009,155 to national party committees and same five corporations spent $27,107,688 on lobbying during 1996 alone[59]); *id.* at 24-25 (admitting that top five corporate donors of nonfederal funds during 1997 and 1998 donated $7,774,020 to national party committees and same five corporations spent $42,000,000 on lobbying during that same period[60]); *see also* Primo Cross

[59] The donors were Philip Morris ($3,017,036 in nonfederal contributions to national political parties, $19,580,000 in lobbying expenditures), Joseph E. Seagram & Sons ($1,938,845 in nonfederal contributions to national political parties, $550,000 in lobbying expenditures), RJR Nabisco ($1,442,931 in nonfederal contributions to national political parties, $1,637,688 in lobbying expenditures), Walt Disney Co. ($1,359,500 in nonfederal contributions to national political parties, $980,000 in lobbying expenditures), and Atlantic Richfield ($1,250,843 in nonfederal contributions to national political parties, $4,360,000 in federal and state lobbying expenditures). Resp. of Intervenors to RNC's First and Second Reqs. for Admis. at 23-24.

[60] The donors were Philip Morris ($2,446,316 in nonfederal contributions to national political parties, $38,800,000 in lobbying expenditures), Communications Workers of America ($1,464,250 in nonfederal contributions to national political parties, $460,000 in lobbying expenditures),

Exam. at 164 [JDT Vol. 27] (noting that nonfederal donations 'is a piddling amount of money . . . relative to what corporations spend on lobbying and . . . philanthropy'); Mann Cross Exam. at 49 [JDT Vol. 17] ('It's not either or. Is more money spent on lobbying than soft money donations? Yes. It varies tremendously. In some sectors it's 2-1, in others 4-1, 10-1. You have given an example in a particular case of 15-1, but the fact is mostof the organizations and economic interests doing that lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties.'). One lobbyist states that his clients hire him in large part because of his contacts on Capitol Hill and because he has access to federal officeholders whether or not their clients have donated money to candidates, officeholders or parties. *See* Hickmott Dep. at 46-47, 50-51 [JDT Vol. 10]; *but see id.* at 50 (noting that his firm gives 'contributions to establish relationships. Having those relationships in many ways then helps us get meetings and continue that relationship.'); Andrews Cross Exam. at 19-20 [JDT Vol. 1] (acknowledging that some organizations gain access by means other than money, such as by using celebrity individuals).

1.75.1.3 Lobbyists maintain that 'basic' or traditional lobbying activities are 'alone insufficient to be effective in many instances in lobbying endeavors. To have true political clout, the giving and raising of campaign money for candidates and political parties is often critically important.' Andrews Decl. ¶ 5 [DEV 6-Tab 1]; Murray Aff. in *Mariani* ¶¶ 6-7 [DEV 79-Tab 4] (testifying that '[a]long with each . . . legislative plan [a plan to 'advance the client's legislative agenda'], and essential to achieving the client's goals, I develop a parallel political financial support plan. In other

AFSCME ($1,340,954 in nonfederal contributions to national political parties, $2,460,000 in lobbying expenditures), Amway Corp. ($1,312,500 in nonfederal contributions to national political parties.

words, I advise my clients as to which federal office-holders (or candidates) they should contribute and in what amounts, in order to best use the resources they are able to allocate to such efforts to advance their legislative agenda. Such plans also would include soft money contributions to political parties and interest groups associated with political issues.'); *see also* Meehan Dep. in *RNC* at 40-41 [DEV 66-Tab 4] ('[P]ower and influence in Washington is not just the amount of soft money an industry contributes to the political parties. I would say that also it's the amount of PAC money that they contribute to the political candidates, it's the amount of hard money they contribute, it's the amount of lobbying money that they expend in order to influence members of Congress.'). Furthermore, testimony from lobbyists shows contributions help lobbyists gain access to lawmakers. Lobbyist Wright Andrews comments:

> The amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system. Some lobbyists help raise large 'soft money' donations and/or host many fundraising events for key legislators. Some simply represent a single client with very deep pockets and can easily reach into large corporate or union funds for 'soft money' donations or other allowable expenditures that may influence legislative actions. Those who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most political clout.

Andrews Decl. ¶ 12 [DEV 6-Tab 1]; *see also* Hickmott Dep. at 50 [JDT Vol. 10]. Andrews testifies that it has become a common practice for lobbyists to 'host a number of fundraisers.' Andrews Decl. ¶ 16 [DEV 6-Tab 1] He explains that '[w] hereas the political parties periodically organize 'gala' events in large ballrooms filled with hundreds of donors, lobbyists now often prefer attending smaller events hosted by other lobbyists, with only ten or fifteen people participating,

all sitting at a dinner or breakfast table with the invited guest elected official. This type event allows lobbyists a better opportunity to build more personal relationships and toexchange views.' *Id.*

1.75.2 Former and current Members of Congress testify that contributions provide donors with access to influence federal lawmakers. Former Senator Rudman describes the system bluntly:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: 'We gave money so you should do this to help us.' No one needs to say it—it is perfectly understood by all participants in every such meeting. . . .
>
> Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect whom Senators and House members see, whom they spend their time with, what input they get, and—make no mistake about it—this money affects outcomes as well

Rudman Decl. ¶¶ 7, 9 [DEV 8-Tab 34]. Senator Simpson testifies that groups used 'to give to someone who was for your philosophy,' but now '[i]t's giving so you can get access.' Simpson Dep. at 11-12 [JDT Vol. 30]. Senator Boren finds the 'comments some of [his] colleagues have made about the system are completely consistent with [his] own experience. For example, former Rep. Romano Mazzoli (D-Kentucky) said: 'People who contribute get the ear of the member and the ear of the staff. They have the access—and access is it. Access is power. Access is clout. That's how this thing works. . .' Similarly, Rep. Jim Bacchus (D-Fla.) has explained: 'I have on many occasions sat down and listened to people solely because I know they had contributed to my campaign.' Boren Decl. ¶ 7 [DEV 6-Tab 8] (citation omitted). Former Senator Simon attests:

> Giving to party committees also helps you gain access to Members. While I realize some argue donors don't buy favors, they buy access. That access is the abuse and it affects all of us. If I got to a Chicago hotel at midnight, when I was in the Senate, and there were 20 phone calls waiting for me, 19 of them names I didn't recognize and the 20th someone I recognized as a $1,000 donor to my campaign, that is the one person I would call. You feel a sense of gratitude for their support. This is even more true with the prevalence of much larger donations, even if those donations go to a party committee. Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions. When you increase the amount that people are allowed to give, or let people give without limit to the parties, you increase the danger of unfair access.

Simon Decl. ¶ 16 [DEV 9-Tab 37]. Senator McCain notes:

> At a minimum, large soft money donations purchase an opportunity for the donors to make their case to elected officials, including the President and Congressional leaders, in a way average citizens cannot. Many legislators have been in situations where they would rather fit in an appointment with a soft money contributor than risk losing his or her donation to the party. Legislators of both parties often know who the large soft money contributors to their party are, particularly those legislators who have solicited soft money. Members of Congress interact with donors at frequent fundraising dinners, weekend retreats, cocktail parties, and briefing sessions that are held exclusively for large donors to the party. Donors or their lobbyists often inform a particular Senator that they have made a large donation. When, as a result of a Member's solicitation, someone makes a significant soft money donation, and then the donor calls the Member a month later and wants to meet, it's very difficult to say no, and few of us do say no.

McCain Decl. ¶ 6 [DEV 8-Tab 29]; *see also* Shays Decl. ¶ 9 [DEV 8-Tab 35] ('Soft money donations, particularly corporate and union donations, buy access and thereby make it easier for large donors to get their points across to influential Members of Congress. The donors of large amounts of soft money to the national parties are well-known to the leadership and to many other Members of Congress. The access to elected officials that large donors receive goes far beyond an average citizen's opportunity to be heard.').

1.75.2.1 Defendant-Intervenors who testified in this case state that they personally do not provide special access to individuals or corporations that provide large contributions to parties, regardless of whether the donation is in federal or nonfederal funds. *See* Feingold Dep. at 116 [JDT Vol. 6] ('I cannot imagine a situation where . . . I would meet with

somebody because they gave soft money.'); Snowe Dep. at 210-11 [JDT Vol. 31] (stating she has never given preferential access to any donor, federal or nonfederal, and that '[e] verybody has access to my office to the extent that I have time available'); Jeffords Dep. at 96-97 [JDT Vol. 11] (stating person's status as a donor to national party committee does not 'affect [his] decisions as to who [he] meet [s] with or give[s] access to'); Meehan Dep. at 180 [JDT Vol. 22] (stating he provides no preferential access to nonfederal donors); Cross Exam. of Shays at 20-21 [JDT Vol. 29] (agreeing he 'pretty much [has] an open door policy to meet people who want to talk to [him] about important legislative issues'). Given the efforts these Members of Congress have made over the past years to reform the political system, it is not surprising that they would have such policies. These Members, however, do not claim to speak for the rest of their colleagues.

1.75.3 Corporate donors testify that contributions provide access to influence lawmakers. Wade Randlett testifies that 'many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against.' Randlett Decl. ¶ 14 [DEV 8-Tab 32].

Chairman Gerald Greenwald[61] testifies that

> labor and business leaders are regularly advised that—and their experience directly confirms that—organizations that make large soft money donations to political

[61] Mr. Greenwald is currently Chairman Emeritus of United Airlines, the largest employee majority-owned company in the United States. From 1994 through his retirement in 2000, he served as the Chairman and CEO of United. Prior to that, he was vice chairman at Chrysler Corporation and worked at Ford Motor Company. Greenwald Decl. ¶ 2 [DEV 6-Tab 16]

> parties in fact do get preferred access to government officials. That access runs the gamut from attendance at events where they have opportunities to present points of view informally to lawmakers to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union. . . . [Some unions and corporations] give large soft money contributions to political parties—sometimes to both political parties—because they are afraid to unilaterally disarm. They do not want their competitors alone to enjoy the benefits that come with large soft money donations: namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action. Labor and business leaders believe—based on experience and with good reason—that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties.

Greenwald Decl. ¶¶ 10, 12 [DEV 6-Tab 16]; *see also* Hassenfeld Decl. ¶¶ 23-24 ('I think companies in some industries have reason to believe that because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed.') [DEV 6-Tab 17].

An Eli Lilly and Company memorandum states that its 1995-96 political 'contributions and the related activities we have participated in have been key to our increased role and ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment.' Eli Lilly

and Company Memorandum (Jan. 15 1997), ODP0018-00481 to 86 [DEV 69-Tab 48].

1.75.4 The former Chairman of the DNC testifies that '[m]any contributors of large sums of money- both Republicans and Democrats—gain access to party and governmental officials that they otherwise would not have. With this access, contributors are able to make their cases to people who make public policy and take official governmental action.' Fowler[62] Decl. ¶ 6 [DEV 6-Tab 13]

1.75.5 Individual donors testify that contributions provide access to influence federal officeholders on issues of concern to them. Steven Kirsch testifies that

> [p]olicy discussion with federal officials occurs at major donor events sponsored by political parties. I have attended many such events. They typically involve speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues. For example, at a recent event. I was able to speak with a Senator representing a state other than California and we had a short conversation about how our respective staffers were working together on a particular issue.

Kirsch Decl. ¶ 12 [DEV 7-23]. Similarly, Peter Buttenwieser testifies:

> Events, meetings and briefings held for soft money donors provide opportunities for the donors to hear speeches and engage in policy discussions with federal office holders. There is also a certain amount of politicking and lobbying at these events. This is true

[62] Mr. Donald Fowler from 1971 until 1980, he served as Chairman of the South Carolina Democratic Party and from January 1995 until January 1997 he served as Chairman of the Democratic National Committee. Fowler Decl. ¶ 2 [DEV 6-Tab 13].

> particularly in the side discussions, in which donors can approach office holders and discuss their issues.

Buttenwieser Decl. ¶ 25 [DEV 6-Tab 11]. He also observes that

> [t]here is no question that those who, like me, make large soft money donations receive special access to powerful federal office holders on the basis of the donations. I am close to a number of Senators, I see them on a very consistent basis, and I now regard the Majority Leader as a close friend. I understand that the unusual access I have correlates to the millions of dollars I have given to political party committees, and I do not delude myself into thinking otherwise. Not many people can give soft money on that scale, and it naturally limits the number of those with that level of access.

Id. ¶ 22. Arnold Hiatt testifies that

> [a]s a result of my $500,000 soft money donation to the DNC, I was offered the chance to attend events with the President, including events at the White House, a number of times. I was offered special access as a result of the contributions I had made, though I generally never took advantage of that access. One event that I did attend was a dinner at the Mayflower Hotel in Washington, D.C. in approximately March 1997 with President Clinton and Vice- President Gore. The dinner was for the largest donors to the DNC, about thirty people. I did not plan on attending but I went because several people urged me to use the occasion to speak in favor of campaign finance reform. I used the opportunity to talk to the President about how the campaign finance system in this country had become a crisis, and argued that the crisis provided an opportunity for the President to provide some leadership. I don't think that we got the leadership I was seeking on the campaign finance issue,

> but I did get the chance to make a personal pitch to the President as a result of my donation.

Hiatt Decl. ¶ 9 [DEV 6-Tab 18]. Hiatt testifies that others in attendance also shared their views on policy matters of importance to them as the event was advertised as an opportunity to 'give advice to the president.' Hiatt Dep. at 119-21 [JDT Vol. 10]; *see also* Hassenfeld Decl. ¶ 12-13 [DEV 6-Tab 17] ('[W] hen given the opportunity, some donors try to pigeonhole or corner Members, in a less than diplomatic way, to discuss their issues at these events.'); Geschke[63] Decl. ¶ 5 [DEV 6-Tab 14] (testifying that in connection with $50,000 in federal and nonfederal donations made to the DNC he and his wife attended a dinner of 10 to 12 people with President Clinton 'last[ing] two or three hours, and consist[ing] primarily of a conversation about issues of importance to the nation and the President's program'); RNC 0026901 [IER Tab 7] (note from the director of the RNC's Team 100 program thanking a donor for 'facilitating Dow [Chemical]'s generous contribution to the Republican Party. It's a timely donation as we head into the final hours of the campaign. Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich].'); RNC 00031843 [IER Tab 7] (letter from donor to RNC Chairman Jim Nicholson telling him 'I do feel I have benefited [sic] from Team 100 in the audience it has afforded me with party leaders'); RNC 0194817 [IER Tab 1.E] (letter from RNC to a pharmaceutical company asking the company for its opinion and suggestions on the enclosed RNC 'health

[63] Mr. Charles Geschke is Chairman of the Board of Adobe Systems, Inc., which he co-founded in 1982. Geschke Decl. ¶ 1 [DEV 6-Tab 14]. Since 1994, Mr. Geschke estimates that he has donated over $150,000 in federal funds to federal political committees, and over $18,000 in non-federal funds to national party committees. *Id.* ¶ 3 [DEV 6-Tab 14].

> care package' and a $250,000 donation to join the RNC's Season Pass program).

Thomas McInerney, a large contributor to the Republican party, states that his support for the Republican Party at the national, state, and local levels is not dependent upon gaining access to federal officeholders. McInerney states that he would support the Republican Party whether or not he was solicited by a federal officeholder and whether or not his contribution resulted in attendance at an event that included federal officeholders. McInerney Aff. ¶ 17 [9 PCS]. Even so, McInerney attests that he has been *offered* access to federal officeholders in exchange for his donations of nonfederal funds. *Id.*[64]

The Political Parties Facilitate Access to Members of Congress for Their Large Contributors

1.76 Party leaders facilitate direct communications on matters of policy between nonfederal money donors and officeholders. Several documents in the record demonstrate this fact.

For example, a handwritten note dated February 21, 1995 from RNC Chairman Haley Barbour to [a major donor] stated, in part: 'Dear [_____]: Thank you for your very thoughtful memo on the estate and gift tax law. I've read it and will pass it along to appropriate Senators, Representatives and staff folks when I'm on the Hill tomorrow.' ODP0031-01403 to 04 [DEV 71-Tab 48]. A March 28, 1995, letter from House Ways and Means Committee Chairman Bill Archer (R-TX) to the donor thanked the donor for his 'intriguing' proposal, noting Archer's personal preference that the estate

[64] Mr. McInerney's affidavit includes statements about his understanding of the legal effect of New York campaign laws which is irrelevant to the cases at bar. *See* McInerney Aff. ¶ 8 [9 PCS]. His affidavit also contains statements which suggest an incomplete understanding of the impact BCRA will have on his campaign donations.

and gift taxes be repealed completely. ODP0031-01412 [DEV 71-Tab 48]. A March 31, 1995 letter from the donor to Team 100 Director Timothy Barnes enclosed the donor's 1995 Team 100 membership check and requested that Barnes provide Barbour with a copy of Archer's March 28, 1995 letter. ODP0031-01406 to 11 [DEV 71-Tab 48]. Team 100 membership requires a $100,000 donation every four years, with $25,000 donations in each intervening year. Findings ¶ 1.77.1.

A handwritten note dated Oct. 27, 1995, from RNC Chairman Haley Barbour asks Senate Majority Leader Bob Dole to meet with the CEO of Pfizer, a member of the RNC's 'Team 100' nonfederal money donor group, to discuss an extension of the Section 936 tax credit:

> Dear Bob
>
> [____], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see Bill. [signed] Haley.

ODP0025-02456 to 57 [DEV 70-Tab 48].

A letter from the chairmen of the Congressional Forum of the NRCC addressed to the Association of Trial Lawyers of America discusses an upcoming Congressional Forum Chairman's Dinner, and notes: '[o]ur event will give you an excellent opportunity to meet with the Members of the [Judiciary Committee] to discuss issues relevant to your organization.' ODP0042-00025 [DEV 71-Tab 48]; *see also* July 10, 1996 letter from John Palmer to [redacted addressee] (reminding addressee that Palmer had asked him to join the RNC's Team 100, and noting that RNC Chair Barbour

escorted new Team 100 member and Energy CEO [_____] on four appointments that were 'very significant' in legislation affecting companies like his and made him 'a hero in his industry'), ODP0023-02043 [DEV 70-Tab 48]; RNC0044465 [DEV 93] (Memorandum from Tim Barnes of the RNC to Royal Roth noting that someone from [a company] had been 'trying to establish a contact in Senator Dole's office for [a company executive]. As you know, [this executive] has been very generous to the RNC. If there is any way you can assist, it would be greatly appreciated.'); ODP0030-03512 to 13 [DEV 71-Tab 48] (notes of telephone call between Jim Nicholson of the RNC and a Team 100 member, which states that Nicholson will take up an issue discussed with Senator Trent Lott); [DEV 71] Letter from RNC Chairman Jim Nicholson to [a donor], August 18, 1998, copies to House Speaker Newt Gingrich, House Majority Leader Dick Armey and Congressman John Linder ODP0033-00534 (stating 'I appreciate your interest in helping us hold onto our majority in the House. . . . I can tell you every single dollar of your contribution will go directly into *Operation Breakout* If you will make your check out (which can be personal or corporate) to the Republican National Committee and annotate it for *Operation Breakout* I will personally show a copy of it to Newt, Dick Armey and John Linder. Please feel free to accompany it with a transmittal letter containing any other message that you choose.'); ODP0042-000654 (memorandum to all Congressional Forum members from the chairmen, informing them of an upcoming dinner featuring members of the Banking Committee, noting that '[o]ur event will give you an excellent opportunity to meet with members of the committee to discuss issues relevant to your organization') ; ODP0042-01111 [DEV 71-Tab 48] (letter from NRCC to the Federal Managers' Association, noting an upcoming dinner where the addressee could express 'interests and concerns regarding upcoming legislation'); RNC0156717 (letter from RNC to

Senator Hagel staffer, asking Senator Hagel to meet with a donor for four 'key' reasons including: '[h]e runs [sic] $80,000,000 high tech business,' and '[h]e just contributed $100,000 to the RNC.').

In addition to these documents, the record includes corroborating testimony like that of former Senator Wirth who states:

> The Democratic national campaign committees sometimes asked me to meet with large donors to the party whom I had not met before. At the party's request, I met with the donors. I understood that the donors' goal in making the large contributions was often to occasion meeting(s) with me or other prominent Democratic congressional leaders to press their positions on legislative issues. On these occasions, sometimes all I knew about the donor would be the issue in which he was interested.

Wirth Decl. Ex. A ¶ 15 [DEV 9-Tab 43]. Former DNC Chairman Donald Fowler testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government.

Fowler Decl. ¶ 8 [DEV 6-Tab 13].

1.76.1 The RNC's Finance Director attests that the RNC does not arrange meetings with government officials for any of its donors—federal or nonfederal. B. Shea Decl. ¶ 44 [RNC Vol. V]. She states that the RNC Finance Division, '[a]s a matter of policy,' passes along requests from donors for meetings with a federal officeholder to that officeholder's

scheduling staff 'without inquiring into the purpose of the proposed meeting,' 'neither . . . advocate[s] a meeting nor ascertain[s] whether a meeting has been arranged,' does not provide to the officeholder's scheduler the amount of the money that donor has contributed to the party. *Id.* at 44, 46. When asked about this policy during her cross-examination, Ms. Shea testified that the policy is an informal, unwritten policy. B. Shea Dep. at 80 [JDT Vol. 29]. She does not say whether this policy applies only to the RNC Finance Division or to the entire committee. Furthermore, the policy is more nuanced than Ms. Shea's declaration implies. According to Ms. Shea, the RNC Finance Division's 'policy' is to not 'force' federal officeholders to meet with donors, but that it may pass along requests to a Member's scheduler and say 'this is a Team 100 member, could you see if you could fit them in.' *Id.* at 82. Indicating that a person is a Team 100 member, which means they give the RNC $100,000 every four years, with $25,000 donations each intervening year, while not informing the scheduler of the precise amount of money the donor gave the RNC, does give the Member's office the message that the individual interested in a meeting is a major donor. *See also supra,* Findings ¶ 1.76 (other instances of RNC officials setting up meetings for major donors with Members of Congress). Furthermore, as Senator Simon has stated, 'Staffers who work for Members know who the big donors are, and those people always get their phone calls returned first and are allowed to see the Member when others are not.' *See supra* Findings ¶ 1.66.

1.77 The political parties have structured their donation programs so that donors are encouraged to contribute larger amounts in order to get access to more exclusive and intimate events at which Members of Congress are present. The evidence also shows that the parties use the enticement of access to secure larger donations. For example, a letter from then-RNSC Chairman Senator McConnell explained that a $25,000 nonfederal fund donation would provide the donor

membership in the NRSC's Chairman's Foundation whose benefits 'include four to five small dinner meetings annually, each focused on a specific Senate Committee. The meetings consist of a briefing with the top committee staff members, followed by a reception and dinner with the staffers and Republican members of the committee to discuss the issues. Foundation members are also invited to all Senatorial Trust events which provide an additional four opportunities year to meet with our Republican Senate Majority.' ODP0037-02271 [DEV 71-Tab 48].

1.77.1 RNC documents show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors. ODP0018- 00113 to 36 [DEV 69-Tab 48] (RNC Brochure 'Donor Programs'); *see also* Resps. RNC to FEC's First RFA's, No. 62 [DEV 12-Tab 10]. The RNC offers its donors a range of different donor programs, for a range of different donor financial levels and interests. ODP0025-00375 to 79 [DEV 70-Tab 48] ('Summary of RNC's Donor Programs'). The RNC President's Club required a $1,000 annual contribution, or $2,000 per couple per year, and held a meeting in Washington, D.C. at least once a year which included policy briefings and discussions led by Republican political leaders. *Id.* at ODP0025-00375; B. Shea Decl. ¶ 14.b [RNC Vol. V]. The Chairman's Advisory Board required a $5,000 annual hard money contribution and offered a 'vigorous and informal exchange of views among Board members and party leaders. . . . Board meetings include three or four panel discussions, each chaired by a Congressional leader or senior policy adviser with particular expertise in the area under consideration.' ODP0025-00375 to 77 [DEV 70-Tab 48]. According to the document, the Chairman's Advisory Board was established 'to enlist the personal energy and professional expertise of Republican leaders in business and community affairs in developing

policy and campaign strategies at the highest levels for the party.' ODP0025-00375 to 77 [DEV 70-Tab 48]. The Republican Eagles required an annual contribution of $15,000 (individual) or $20,000 (with spouse or nonfederal/corporate). *Id.* ODP0025-00377 to 0378, ODP0025-00429 [DEV 70-Tab 48]. The Eagles program offered a series of national and regional meetings with elected Republican Congressional leaders, special access to Republican events, and other benefits. ODP0025-00428 [DEV 70-Tab 48]; ODP0030-02838 to 39 [DEV 71-Tab 48]. The Team 100 program required a donation of $100,000 upon joining and every fourth year thereafter, with $25,000 donations required in each of the three intervening years. ODP0014-00983, ODP0014-01457 to 58 [DEV 69-Tab 48]. The Team 100 program offered members national and regional meetings with the Republican Party leadership throughout the year, special events, membership in the Eagles program, the opportunity to participate in international trade missions, and other benefits. ODP0025-00377, ODP0025-00424, ODP0025-01705 to 13 [DEV 70-Tab 48]. The Season Ticket program required a donation of $250,000 upon joining and renewals thereafter. ODP0022-03045 to ODP0022-3046, ODP0023-02480, ODP0025-01569 [DEV 70-Tab 48]; ODP0030-03408 [DEV 71-Tab 48]. The 'Season Ticket' or 'Season Pass' program offered the greatest and most exclusive range of RNC donor program benefits, including one Team 100 membership, two Eagle memberships, special access to a range of Republican Party events, and the assistance of RNC support staff. ODP0025-01569 [DEV 70-Tab 48]. The RNC also offers the Regents program designed for members who give an aggregate amount of $250,000 in nonfederal funds per two-year election cycle, B. Shea Decl. ¶ 14.g [RNC Vol. V].

1.77.2 The NRSC also offered several major donor programs. In 1995 and 1996, the NRSC offered a corporate donor program called 'Group 21' or 'G21,' which required an annual donation of $100,000. ODP0037-02246, ODP0037-

02275, ODP0037- 02281 [DEV 71-Tab 48]. The 'Group 21' program offered donors 'small dinners with [then-NRSC Chairman] Senator D'Amato and other senators' and other 'VIP benefits.' ODP0037-02275 [DEV 71-Tab 48]. The Chairman's Foundation required an annual corporate (meaning nonfederal money) donation of $25,000. ODP0036-03603 [DEV 71-Tab 48]. The Senatorial Trust required an annual donation of $10,000 (personal) or $15,000 (corporate). ODP0036-03873 to 74 [DEV 71-Tab 48]. The Presidential Roundtable required an annual donation of $5,000 in personal or corporate funds. ODP0037-00315 [DEV 71-Tab 48]. *See also* ODP0036-03525 (letter signed by Senator McConnell to NRSC member asking him to renew his membership, noting that '[y]our non-federal contribution to the Chairman's Foundation will allow us to put our federal dollars directly towards the Senate campaigns, where they are desperately needed.'); ODP0036-3562 (letter signed by Senator McConnell thanking addressee for joining the Chairman's Foundation); ODP0036- 03595 (letter signed by Senator McConnell soliciting someone to join the Chairman's Foundation); ODP0037-01861 to 69 (NRSC brochure) [DEV 71-Tab 48]; Vogel Decl. ¶ 51 ('The NRSC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised.'), Tabs A, J [DEV 9-Tab 41] (2002 Senatorial Trust materials).

1.77.3 'The DSCC hosts several different types of events to motivate persons to donate funds. These events are often attended by Democratic Senators, Democratic Senate candidates, other Democratic holders of federal office, Democratic Cabinet officials and other celebrities who neither seek nor hold federal office.' Jordan Decl. ¶ 52 [DEV 7-Tab 21]. For example, during the 1996 election cycle, the DSCC offered memberships in its 'Leadership Circle.' COL0002-00698 [DEV 78-Tab 152]. Membership required a

$10,000 annual contribution for individual donors, and $15,000 for PACs. *Id.* Benefits included 'special Leadership Circle weekend retreats and issue seminars with Senators and Washington officials. . . . Leadership Circle members also receive tickets to the annual Senate Fall Dinner, followed by a day of issue oriented meetings with Senators and political experts.' *Id.* The DSCC also offered memberships to its 'Majority Trust,' 'the premiere donor program of the DSCC for individuals who contribute $20,000 per calendar year.' *Id.* 'The Majority Trust offers important programs, weekends and retreats throughout the year attended by Democratic Senators.' *Id.* The DSCC also solicits donations for special events. For example, for the DSCC's 1999 Annual Fall Dinner, a $50,000 nonfederal donation bought the donor benefits including a priority table at the dinner and one ticket to the VIP Reception. Jordan Decl. Attach. L (DSCC-L-0025).

1.77.4 The NRCC offers individuals or PACs that contribute $15,000 annually, or corporations that give $20,000 annually, membership in its Congressional Forum which 'has been designed to give its members an intimate setting to develop stronger working relationships with the new Republican Congressional majority,' ODP0042-01226 [DEV 71-Tab 48], and the 'benefit that attracts most Forum members are the dinners with Committee Chairmen and the Republican members from each Committee,' ODO0042-00028 [DEV 71-Tab 48]. These dinners 'average about 75 people including Members—that means at least two Committee Members at every table.' ODP0042-00171 to 72 [DEV 71-Tab 48]. 'In addition to the monthly dinners, we offer two annual meeting weekends, a golf tournament and a dinner with the Elected Leadership and all the Committee Chairs is included as a benefit of . . . . Forum membership.' *Id.* Forum benefits also include all the Benefits of the NRCC's House Council program. ODP0042-01226 [DEV 71-Tab 48]; *see also* ATT 000018 [DEV 7-Tab 20] (invitation to

1999 Republican Senate-House Dinner, with escalating benefits including meetings, receptions and a breakfast with Congressional leaders).

1.77.5 'The DCCC uses a variety of donor programs to motivate persons to donate funds. These programs tend to be associations of donors and fundraisers, who are grouped by the nature and extent of the funds given or raised.' Wolfson Decl. ¶ 53 [DEV 9-Tab 44]. For the 2002 election cycle, the DCCC's 'Major Donor Programs' included the Business Forum, which required an annual contribution of $10,000. *Id.* at Tab J (DCCC-J-0007). Business Forum Members' benefits included '[b]i-monthly political briefings and receptions with the House Democratic Leadership and other Democratic pro-business Members in the House of Representatives[, an a]nnual retreat with Chairwoman Lowey and the House Democratic Leadership[, an] annual Democratic Congressional Dinner event package[, and a] bi-monthly conference call/briefing with Leader Gephardt and Chairwoman Lowey. *Id.* (capitalization altered). The Majority Council required a $50,000 annual contribution, and included the bi-monthly conference call, 'complementary invitations to all DCCC fundraising events, including the Annual Democratic Congressional Dinner with private reception and political briefing [, and] complementary invitations to Premiere Retreats with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members. *Id.* (capitalization altered). Membership to the National Finance Board required a $100,000 annual contribution, and included as benefits all of the 'Majority Council' benefits as well as 'two private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey in Telluride, CO and Hyannisport, MA.' *Id.* (capitalization altered).

1.77.6 The state parties also use the promise of access to federal lawmakers to encourage larger donations. *See, e.g.*, CDP 0098 [DEV 106] (CDP brochure showing that those who contribute $100,000 to the CDP are classified by the party as 'Trustees,' and that the CDP 'recognizes its extraordinary supporters with extraordinary opportunities,' providing 'Trustees' with '[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer, Lt. Governor Gray Davis, Controller Kathleen Connell and other national figures.'); CRP-00269 (flyer titled 'The California Golden Circle,' noting that '[t]hrough Golden Circle contributions, California Republicans have been able to elect leaders from the White House to the State House,' that Golden Circle members will assist the CRP 'goal ... to deliver fifty-five electoral votes for our Republican Presidential nominee in 2004, maintain a Republican majority in Congress, and elect a Republican Legislature,' and including among Golden Circle 'Membership Benefits' 'private receptions/meetings held throughout California with local, state and national Republican leaders to discuss current political issues').

1.77.7 Contributors request tobe seated with certain lawmakers at these donor events. For example, an RNC 'Table Buyer's Guest List' sheet for 'The Official 1995 Republican Inaugural Gala' filled out by 'Am. Banker's Ass'n/Nation's Bank' contained a request to sit with certain Members of Congress and 'anyone on House Banking Comm.' ODP0023-3288 [DEV 70-Tab 48]; *see also* 2000 RNC Gala Leadership Levels, undated, RNC0022509 [DEV 92]; 2000 RNC Attendance Forms, April 20, 2000, RNC0236323 [DEV 97] (filled out by Microsoft attendee requesting to be seated with a particular Senator or 'Leadership Commerce Comm. or Judiciary'); RNC0145258 [DEV 93] (filled out by Chevron corporation attendee, requesting to be seated with a Member from California, Louisiana or Texas); RNC0202199 [DEV 96] (filled out for

the MBNA table, requesting to be seated with five particular Senators); RNC0202200 [DEV 96] (filled out for the Reliant Resources, Inc. table, asking to be seated with one specific Representative and five named Senators); RNC 0032805—06, RNC 0032799 [DEV 92] (request for Burger King Chairman and Team 100 member who donated $100,000 to be seated with Senator Fred Thompson and three other Senators, and document showing Senator Thompson was placed at the Burger King table). PhRMA's Judith Bello testifies that the five Members of Congress PhRMA listed as requested 'VIP' to be seated at its table at the 2000 Republican House-Senate dinner were all Members who had responsibility or oversight over issues of importance to the pharmaceutical industry. Bello Dep. at 82 [JDT Vol. 1].

1.77.8 The political parties have used such opportunities to promote their various donor clubs. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide 'excellent opportunities for both corporate executives and Washington representatives to meet and discuss current issues with leading Republican Senators.' ODP0036-03603 [DEV 71-Tab 48]; *see also* RNC 0286400 [IER Tab 4] (offering $250,000 donors to the RNC Gala Co-Chairman status which included a 'Breakfast and Photo Opportunity with [Senate Majority Leader] Trent Lott and [Speaker of the House] Newt Gingrich,' as well as a 'Luncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice').

1.77.9 According to lobbyist Robert Rozen:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Rozen Decl. ¶ 11 [DEV 8-Tab 33]; *see also* COL0002-00698 (flyer listing DSCC Donor Programs, and including as part of its Majority Trust 1996 program, 'a weekend in Aspen, CO in January, Superbowl weekend, Mardi Gras with Senator Breaux, a Jefferson Weekend in Charlottesville, VA in June, and the annual summer retreat on Nantucket Island in July.').

1.77.10 Sometimes the link between large donations and special access to elected federal officials is even more direct. A call sheet prepared for then- DNC Chair Fowler instructs him to call a number of large contributors ask for donations, and invite them for lunch with the President of the United States ('POTUS'). DNC 113-00137 to 38 [DEV 134-Tab 7] ('Ask her to give 80k more this year for lunch with Potus on October 27th.') ('Ask him to write another 100K to become a Managing Trustee for the campaign and come to lunch with POTUS on Oct. 27.'). A CDP call sheet entitled 'Child Call List, 5/16/96,' includes the notation that a potential donor should be asked 'if they might be able to do $25,000 for a small mtg with the President, you know it's steep, but want to include them in these types of meetings.' CDP 00124 [IER Tab 11].

Nonfederal Donations are More Effective than Federal Contributions at Procuring Access for Donors

1.78 Donors give nonfederal money, rather than federal money, to political parties because large nonfederal donations are more effective for obtaining access to federal officials than several small federal contributions. *See, e.g.*, Hickmott Decl., Ex. A. ¶ 47 [DEV 6-Tab 19] (explaining that '[i]f you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates.'); Andrews Decl. ¶ 14 [DEV 6-Tab 1] (stating that 'a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC. Although the donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely to remember the donation and to recognize that such big donors' interests merit careful consideration.'); Randlett Decl. ¶ 13 [DEV 8-Tab 32] ('[Soft money donors] get a level of attention that a $1,000 hard money donor never will. Even someone who wrote 25 $1,000 hard money checks but no soft money is going to get much less attention and appreciation than someone who wrote one large soft money check.'); Rozen Decl. ¶ 12-13 [DEV 8-Tab 33] ('Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly 'non-federal' money—they

are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed. . . . The bigger soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.'); Geschke Decl. ¶ 9 [DEV 6-Tab 14] ('Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do.'); Simon Decl. ¶ 16 [DEV 9-Tab 37] ('Because few people can afford to give over $20,000 or $25,000 to a party committee, those people who can will receive substantially better access to elected federal leaders than people who can only afford smaller contributions or can not afford to make any contributions.'); Kirsch Decl. ¶ 9 [DEV 6-Tab 14] ('Corporations and individuals can use soft money donations to get special access to federal office holders and at least the appearance of influence on issues that are important to them financially or politically. Hard money contributions do not provide the same opportunities for influence on federal policy as soft money donations do.').

1.78.1 In a memorandum to a high-level Fortune 100 company executive outlining a proposed $1.4 million nonfederal fund budget for FY 1999, members of the Company's governmental affairs staff noted that

> [w]ith both houses of Congress and the White House hotly contested this cycle, the importance of soft money,

> and consequently the efforts by the parties to raise even more soft money, is greater than ever. On the Democratic side, [our company's] advocates have already fielded soft money calls from House Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders.
>
> In addition to the increased pressure from party and congressional leaders, it is clear that our direct competitors and potential competitors are weighing in with big soft money donations.

Memorandum from a Fortune 100 company's legislative advocate to a high-level executive, dated March 4, 1999, [citation sealed]. The nonfederal budget request was justified by a number of rationales:

> First, due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC. RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.
>
> Two, . . . the parties have become increasingly reliant on soft money and both feel it is critical to their success in coming elections. Not surprisingly, this has made the parties especially sensitive to which companies contribute soft money, and which don't. As noted, our traditional competitors continue to contribute large

> amounts of soft money and as [our company] expands its business into new areas (e.g. cable, internet, networking) it faces new types of competitors, primarily in the computer and high tech industry, that also contribute heavily. Failure to maintain our soft money participation during this election cycle—given the heightened scrutiny those contributions will receive in the current competitive climate—*may* give our new and traditional competitors an advantage in Washington.
>
> Three, the next Administration will also be determined in this election cycle. Consequently, we will be asked to use soft money contributions to support both national parties at an even greater level than during a non-Presidential year. Funding for the national conventions and next year's national party committee requests should be anticipated in this year's budget and contributed when appropriate to foster the development of relationships with the key officials of the next Administration. Finally, because both parties will be working to influence redistricting efforts during the next two years, we anticipate that we will be asked to make soft money contributions to these efforts. Redistricting is a key once-a-decade effort that both parties have very high on their priority list. Given the priority of the redistricting efforts, relatively small soft money contributions in this area could result in disproportionate benefit.

Id.

Donors Often Contribute Nonfederal Funds to Both Major Political Parties in Order to Ensure Access and Prevent Retaliation

1.79 The record shows that many large contributors give to both political parties. Forty of the top 50 nonfederal money donors in 1996 donated to both political parties, as did 35 of

the top nonfederal money donors in 2000. Mann Expert Report at Tbls. 5-6 [DEV 1-Tab 1]. Most of the top nonfederal contributors who gave to only one political party were either state political party committees (four in 1996) or labor unions (three in 1996, seven in 2000). *Id.* Those involved in political fundraising explain that this practice is a result of donors' desire to have special access to lawmakers from both parties, and also out of concern that if the contributor gives to only one political party the other will perceive an imbalance and punish the donor.

Evidence from the corporate world demonstrates that major nonfederal donors give to both political parties in order to ensure access to lawmakers from both political parties. CEO Randlett comments that '[a]s a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective.'

Internal corporate documents corroborate Mr. Randlett's testimony. An Eli Lilly and Company memorandum shows that the company was concerned about a *Washington Post* article listing it as a significant donor to the Republican party. The memorandum discusses contributions being made at Democratic party events occurring in the near future. The memorandum concludes with: '[____] has talked to the White House and we can get back into this by giving $50[,000]—100,000 to the DNC- says they would be pleased with this.' ODP0018-00463 [DEV 69-Tab 48]; *see also id.* at ODP0018-00461 (the *Washington Post* article), ODP0018-00462 (photocopy of part of the article with handwritten note stating 'Dems are upset. Calls from employees about imbalance. White House stays Dem we are in trouble'). Similarly, an

internal Fortune 100 company memorandum states the following:

> Attached please find an invoice from the NRSC for [our company's] commitment of $25,000 in soft money. As you know, this request was approved during the PAC meeting this week. We recently approved a soft money donation to the New Dominion Fund, requested by Senator Chuck Robb. At the time this request was approved, the team determined that our support in this race would be equal. The request attached balances [our company's] support in this race, as a contribution to the RNSC has been requested by George Allen.

Internal memorandum (Oct. 26, 2000), [citation sealed].

One lobbyist explains that many 'companies and associations that do give soft money typically contribute to both parties . . . because they want access to Members on both sides of the aisle.' Rozen Decl. ¶ 7 [DEV 8-Tab 33]. Members of Congress are also cognizant that donors give nonfederal funds to both parties. As former Senator Bumpers observes: 'Giving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access.' Bumpers Decl. ¶ 15; *see also id.* (noting that the 'business community makes such donations quite often').

Individual donors also acknowledge that nonfederal money donors give to both parties in order to ensure special access to federal lawmakers on both sides of the aisle. Hiatt Decl. ¶ 12 [DEV 6-Tab 18] (testifying '[p]eople give soft money donations to both parties because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional district.'); Buttenwieser Decl. ¶ 23 [DEV 6-Tab 11] ('I am aware that some soft money donors, such as some corporations, give substantial amounts to both major political parties. Based on

my observations, they typically do this because they have a business agenda and they want to hedge their bets, to ensure they get access to office holders on the issues that are important to them. This occurs at the national and state levels.'); Geschke Decl. ¶ 10 [DEV 6-Tab 14] ('In my view, donors who give large amounts of soft money to both major parties are probably hedging their bets in trying to get influence. They may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced.').

1.80 The political parties are aware of this practice, as evidenced by an Ohio Republican Party document titled 'Why People Give,' which lists 'so that they will have access to whoever is the winner' as one reason behind contributions. RNC OH 0418778 [IER Tab 1.H]. The record demonstrates that they have parlayed this knowledge into leverage which they use to pressure donors who have given to the other party to give to theirs as well. CEO Randlett explains how the political parties take advantage of this situation:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: 'Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?' If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or

> influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Randlett Decl. ¶ 12 [DEV 8-Tab 32].

1.80.1 Plaintiffs maintain that the record 'establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process.' RNC Proposed Findings of Fact ¶ 119 (citing Bello Dep. at 39 [stating that it is 'traditional' for PhRMA to 'support the convention activities for both Republicans and the Democrats' because 'we are good civic participants'] and Herrnson[65] Dep. at 495 [DEV 65] [acknowledging 'it is possible' that 'donors of soft money provide money to political parties because they support some members of ... one party, and some members of another party']). This self-serving statement of a PhRMA representative and Dr. Herrnson's acknowledgment that a hypothetical scenario was possible, support the RNC's contention that 'organizations and individuals *may* give to both parties because they desire to be actively involved in the political process.' The extensive testimony and documentary evidence discussed *supra*, however, shows that the primary reason why entities and individuals *do* give to both parties is to ensure access to federal lawmakers. Moreover, interests in participating in the political process and an interest in obtaining access to legislators to influence them are neither incompatible nor mutually exclusive.

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[65] Professor Paul Herrnson is one of Defendant's experts.

Empirical Evidence Linking Donations to Corruption

1.81 Experts testifying in this case agree that no study attempting to statistically or empirically link donations to corruption by federal officials is without flaws. However, even if these studies were universally accepted, it is clear that they would be of limited utility for the purposes of this case. As Defendants' expert Thomas Mann notes, '[m]ost of this research has examined the connections between PAC contributions (a surrogate for interested money) and votes in the House and Senate.' Mann Expert Report at 32 [DEV 1-Tab 1]. However, as Mann observes, there are

> a myriad of ways in which groups receive or are denied favors beyond roll- call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests.

Id. at 33 (citations omitted). In addition, Mann notes that the

> currency of campaign contributions extends well beyond PAC contributions to members' campaign committees. These include brokered if not bundled individual contributions, contributions to leadership PACs controlled by members, contributions to parties and candidates in targeted races and informally credited to members, soft-money contributions to parties and section 527 committees connected to members, and direct expenditures on 'issue ad' campaigns.

Id. at 34. Mann concludes that the 'ways and means of potential influence (and corruption) are much more diverse than those investigated in the early scholarly research.' *Id.*

at 34.[66] Many of these studies also suffer from the fact that the interactions between donations and legislative action are difficult to observe. *See, e.g.*, Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Appendix ¶ III (for more analysis of these studies).

Summary

1.82 The immense quantity of testimonial and documentary evidence in the record demonstrates that large nonfederal contributions provide donors special access to influence federal lawmakers. This access is shown to be coveted by these donors because it provides them the opportunity to have their voices heard and to influence legislation on policy matters of concern to them. Testimony from lobbyists, major donors, federal lawmakers and political party officials, as well as internal political party and corporate documents, shows that donors expect to receive this access, that this expectation is fostered by the political parties and federal lawmakers, and that special access is in fact provided to major donors. Corroborating this evidence is the fact that nonfederal money donors often give to both political parties, which demonstrates that in many cases, large nonfederal donations have less to do with political philosophy than with obtaining access to power. The record also makes clear that the best method of obtaining special access to federal

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[66] Mann notes that where the variables of '[p]arty, ideology, constituency, mass public opinion and the president . . . . are less significant, there is evidence that interest group contributions, particularly to junior members of Congress, have influenced roll call votes - for example, on financial services regulation.' Mann Expert Report at 32-33 DEV 1-Tab 1] (citing Thomas Stratmann, Can Special Interests Buy Congressional Votes? Evidence from Financial Services Legislation. Paper (prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Boston, 29 August—1 September), available from the APSA Proceedings Web site: http://apsaproceedings.cup.org/Site/papers/022/022023 StratmannT.pdf. 2002.

lawmakers is through large nonfederal donations, rather than smaller donations under the federal campaign finance regime.

The political parties have taken advantage of the desire of donors for special access by structuring their entire fund-raising programs to entice larger donations with the promise of increased and more intimate access to federal officials. The political parties have also pressured donors to give donations, playing off donors' fears of denial of access or political retribution. From this record it is clear that large donations, particularly unlimited nonfederal contributions, have corrupted the political system. This fact has not been lost on the general public, as is explored *infra*.

Public Perception of Corruption

1.83 The record demonstrates that the public believes there is a direct correlation between the size of a donor's contribution to a political party and the amount of access to, and influence on, the officeholders of that political party that the donor enjoys thereafter.

1.83.1 A research poll of 1,300 adult Americans conducted by two prominent political pollsters, Mark Mellman[67] and Richard Wirthlin,[68] finds that the public perceives that large

[67] Mark Mellman is 'CEO of The Mellman Group, a polling and consulting firm. . . . Mellman has helped guide the campaigns of some fifteen U.S. Senators, over two dozen Members of Congress, and three Governors, as well as numerous state and local officials. In addition, Mellman works with a variety of public interest organizations . . . and corporate clients . . . He has served as a consultant on politics to CBS News, a presidential debate analyst for PBS, a contributing analyst for The Hotline, National Journal's daily briefing on politics, and is currently on the faculty of The George Washington University's Graduate School of Political Management.' Mellman and Wirthlin Report at 2 [DEV 2-Tab 5].

[68] Richard Wirthlin is 'Chairman of the Board of Wirthlin Worldwide, a strategic opinion research firm he founded in 1969, which now is one of the top companies in its field. Wirthin is perhaps best known as President Reagan's strategist and pollster. . . . Mellman and Wirthlin Report at 2-3 [DEV 2-Tab 5]. He is widely respected in the 'field of social science research and one of this country's most respected political and business strategists.' *Id.* Wirthlin 'was chief strategist for two of the most sweeping presidential victories in the history of the United States. In 1981 he was acclaimed Adman of the Year by Advertising Age for his role in the 1980 campaign and in 2001 was one of four Republicans awarded American University's 'outstanding contribution to campaign consulting.' In the same year, he was designated 'Pollster of the Year' by the American Association of Political Consultants.' *Id.* at 3. The *Washington Post* named Wirthlin 'the prince of pollsters' and George Gallup, Jr. said Wirthlin is 'one of the very best at our craft.' *Id.*

donations as having a corrupting influence on federal officeholders.[69] *See* Mellman and Wirthlin Report [DEV 2-Tab 5].

Mellman and Wirthlin conclude that '[a] significant majority of Americans believe that those who make large contributions to political parties have a major impact on the decisions made by federally elected officials.' In addition, Mellman and Wirthlin find that many Americans believe that the 'views of these big contributors sometimes carry more weight than do the views of constituents or the best interests

[69] The survey was conducted over a period of five days (August 28, 2002 through September 1, 2002), and the pollsters made an average of 4.58 dialings per telephone number in the sample set in order to ensure that the sample was representative. *See* Mellman and Wirthlin Report at 22-23 [DEV 2- Tab 5]. The study's contact rate was 38 percent, more than double the industry average of 15 percent. *Id.* at 23. The rate of refusal of the respondents who refused to be polled was within the normal range for a random telephone survey conducted in the United States. *Id.* The pollsters took several steps to avoid bias. *Id.* at 24; *see also* Wirthlin Cross Exam. at 40 (explaining that the pollsters took steps to avoid bias by randomly ordering the questions, 'so that there is no sequence developed where one question may, if always asked in the same order, affect[] the second question.'). The statistical margin of sampling error, that is, the error due to sampling versus if the pollsters talked to every American in the United States, is 2.7 percentage points: the actual opinions of Americans will be within 2.7 percentage points of those reported in the study 95 percent of the time. *Id.* at 22.

of the country.' *Id.* at 6 [DEV 2-Tab 5]. The major findings of their poll include:

- Seventy-seven percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government. Fifty-five percent thought big contributions had a great deal of impact; 23 percent thought such donations had some impact. *Id.*
- Seventy-one percent of Americans 'think that members of Congress sometimes decide how to vote on an issue based on what big contributors to their political party want, even if it's not what most people in their district want, or even if it's not what they think is best for the country.' *Id.* at 7.
- A 'large majority (84%) think that members of Congress will be more likely to listen to those who give money to their political party in response to their solicitation for large donations.' *Id.* at 8.
- 'Over two-thirds of Americans (68%) . . . think that big contributors to political parties sometimes block decisions by the federal government that could improve people's everyday lives.' *Id.* at 8.
- '[A]bout four in five Americans think a Member of Congress would be likely to give special consideration to the opinion of an individual, issue group, corporation, or labor union who donated $50,000 or more to their political party (81%) or who paid for $50,000 or more worth of political ads on the radio or TV (80%). By contrast, only one in four Americans (24%) think that a member of Congress is likely to give the opinion of someone like them special consideration.' *Id.* at 9.

1.83.1.1 The Mellman and Wirthlin Report did not measure the public's understanding of the campaign finance system,

and did not ask if the respondents understood the difference between nonfederal and federal donations. *See* Cross Exam. of Mellman at 31-35 [JDT Vol. 22]. Mellman testifies that the purpose of the poll was to measure the public's perceptions. *Id.* at 31. According to Plaintiffs' expert, Q. Whitfield Ayres, the public does not understand the distinction between federal and nonfederal donations and is not aware of campaign finance regulations. *See* Ayres Expert Report ¶ 8(a). Dr. Shapiro, an expert for Defendants, responds that

> [t]he public does not need detailed knowledge about . . . the nuances of existing campaign finance regulations, and the extent to which these regulations are enforced in order to form strong opinions toward campaign finance. The public can easily understand how political donations can lead to political access and influence—how political parties and politicians will pay attention to those who give money to the parties. The public has long questioned the motivations of, and responded with distrust toward labor unions, corporations, special interests more generally, and the government itself. The public is especially troubled and animated by these problems when they become blatantly visible in widely publicized incidents and scandals such as those involving Enron and the large soft money donations to the Democratic Party and the roles played by the Clinton Administration, President Bill Clinton, and Vice President A1 Gore.

Shapiro Rebuttal Report at 9 [DEV 5-Tab 2] (citations omitted). Mr. Ayers also comments that his research finds that 'every conclusion that the Wirthlin-Mellman report reached about 'large' or 'big' contributions and contributors applies with equal force to the new, hard money limits in the BCRA.' Ayers Rebuttal Report at 4 [RNC Vol. VIII]. Mr. Wirthlin notes that what Mr. Ayers' research demonstrates is that 'in the eyes of most Americans . . . $50,000 is considered

[a] large' contribution, but comments that if that is the case then the nonfederal donations given in the past which far exceed $50,000 would be viewed as even larger. Wirthlin Cross Exam. at 148, 155 [JDT Vol. 32]. And, 'as you move up the scale, there's going to be pretty close to unanimity on what constitutes big in the form of campaign contributions.' Mellman Cross Exam. at 69 [JDT Vol. 22].

1.83.2 The results of the Mellman-Wirthlin study are confirmed by the research of Robert Shapiro, a professor at Columbia University, who analyzed public perception of nonfederal money contributions to political parties by reviewing all publicly available opinion survey data sources. Shapiro Expert Report at 7-8. [DEV 2-Tab 6]. The survey data Shapiro examined was comprised mostly of telephonic opinion polls. *Id.* at 8. Specifically, Shapiro focused on 'public opinion data based on responses to surveys that were fielded since 1990' to determine the public's answers to several questions, including two questions which read: 'To what degree has the public perceived corruption in politics connected to the influence of money and large campaign donations?' and 'What have been the public's perceptions and opinions toward the substantial political donations in the form of soft money contributions to political parties?' *Id.* at 3, 8. According to Shapiro, poll results show that the 'public has opposed large unregulated soft money contributions to political parties [and] that the public has been troubled by large soft money donations.' *Id.* at 13. In addition, Shapiro concluded that the poll data showed 'that a substantial proportion of the public has perceived corruption in the political system, and that we have been losing ground.' *Id.* at 11.

1.83.3 Former and current Members of Congress testify that their constituents believe that these large contributions to parties present an appearance of corruption. *See* Simpson Decl. ¶ 14 DEV 9-Tab 38] (testifying that '[b]oth during and

after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations.'); 144 S. Cong. Rec. S1041 (Feb. 26, 1998) (statement of Sen. Baucus) (stating that '[p]eople tell me they think that Congress cares more about 'fat cat special interests in Washington' than the concerns of middle class families like theirs. Or they tell me they think the political system is corrupt.'); 146 Cong Rec. S4262 (May 23, 2000) (statement of Sen. Feingold) (stating that '[t]he appearance of corruption. . . . We all know it's there. We hear it from our constituents regularly. We see it in the press, we hear about it on the news.'); Letter from Representative Asa Hutchinson to RNC Chairman Nicholson dated July 9, 1997, ODP0014-00003-4 (declining to support Nicholson's proposed campaign finance legislation because Hutchinson had to balance Nicholson's concerns 'with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money .... If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts.'); Congressman Meehan Decl. in *RNC* ¶¶ 15-17 [DEV 66-Tab 4] (stating that 'there is a strong feeling in my [Congressional] district that soft money is corrupting the political process and influencing elections. My constituents feel that very large donations to the party committees, on the order of twenty-five, fifty or one hundred thousand dollars from one company or individual, have a corrupting influence.'); Rudman Decl. ¶ 13 [DEV 8-Tab 34] ('The soft money system not only distorts the legislative process, it breeds deep cynicism in the minds of the public. I know this from my own experience in talking to citizens and voters over the years.').

1.83.4 Large donations made by groups or persons with an interest in pending legislative activity, even if not corrupting,

create an appearance of corruption, especially when the donations are given in close proximity to legislative action on bills of interest to the donors. Senator McCain states:

> While the [generic drug] bill was pending [in 2002], the NRSC and NRCC held a large gala fundraiser to raise almost $30 million in largely soft money contributions, a substantial portion from pharmaceutical companies. According to newspaper reports, among the largest contributors to the gala were GlaxoSmithKline PLC ($250,000), PhRMA ($250,000), Pfizer ($100,000), Eli Lilly & Co. ($50,000), Bayer AG ($50,000) and Merck & Co. ($50,000).

McCain Decl. ¶ 11 [DEV 8-Tab 29].

> [T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

McCain Dep. [JDT Vol. 18] at 174-175.

Senator Feingold commented that

> members of the National Consumer Bankruptcy Coalition, an industry lobbying group made up of the major credit card companies such as Visa and Mastercard and associations representing the Nation's big banks and retailers, gave nearly $4.5 million in contributions to parties and candidates. . . . Some of the campaign contributions from these companies seem to be carefully timed to have a maximum effect. It is very hard to argue that the financial largess of this industry has nothing to do with its interest in our consideration of bankruptcy legislation. For example, on the very day [in 1998] that the House passed the conference report last year and sent it to the Senate, MBNA Corporation gave a $200,000 soft money contribution to the National Republican Senatorial Committee.

145 Cong. Rec. S14067-68 (Nov. 5, 1999); *see also* Feingold Dep. at 67 [JDT Vol. 6]. '[A] $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people.' 145 Cong. Rec. S12593 (Oct. 14, 1999) (statement of Sen. Feingold). Senator Feingold has also stated that '[t]he appearance of corruption is rampant in our system, and it touches every issue that comes before us.' 147 Cong. Rec. S2446 (Mar. 19, 2001) (statement of Sen. Feingold); *see also* 147 Cong. Rec. S3248-49 (April 2, 2001) (statement of Sen. Levin) ('[P]ermitting the appearance of corruption undermines the very foundation of our democracy —the trust of people in the system.').

1.83.5 The Defendants have also submitted a substantial number of press reports which suggest that large soft money donations present the appearance of corruption. *See, e.g.*, Jackie Koszczuk, *Soft Money Speaks Loudly on Capitol Hill This Season*, Cong. Q., June 27, 1998, at 1736; Jill Abramson, *Money Buys A Lot More Than Access*, N.Y. Times, Nov. 9, 1997, at 4; Jane Mayer, *Inside the Money Machine*, The New Yorker, Feb. 3, 1997, at 32; Don Van Atta, Jr. and Jane Fritsch, *$25,000 Buys Donors 'Best Access to Congress'*, N.Y. Times, Jan. 27, 1997, at A 1; *see also* Krasno and Sorauf Report at 19-20 DEV 1-Tab 2]; Primo Rebuttal ¶ 7 [2 PCS] (stating that '[t]he news media reinforces this view [that money distorts the political process]

by portraying the political process as being driven by campaign contributions . . . .'). Senator Rudman states

> Almost every day, the press reports on important public issues that are being considered in Congress. Inevitably, the press draws a connection between an outcome and the amount that interested companies have given in soft money. . . . Even if a Senator is supporting a position that helps an industry for reasons other than that the industry gave millions to his party, it does not appear that way in the public eye.

Rudman Decl. ¶ 11 [DEV 8-Tab 34].

1.83.6 High-level political contributors testify that large nonfederal donations corrupt the political system or present an appearance of corruption. *See, e.g.*, Hassenfeld Decl. ¶ 19 [DEV 6-Tab 17] ('It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the appearance, if not the reality, of special interest influence on federal policy.'); Kirsch Decl. ¶ 15 [DEV 7-Tab 23] ('[T]he current system of financing federal elections permits corruption to flourish.'); Buttenwieser Decl. ¶ 30 [DEV 6-Tab 11] ('Large soft money donations can create at least the appearance of influence on federal policy making. . .').

A national survey of major congressional donors conducted in 1997 found that a majority were critical of the campaign finance system and supportive of reform. John Green, Paul Herrnson, Lynda Powell, and Clyde Wilcox, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform-Minded* (1998), FEC 101-0282, 0283 [DEV 45-Tab 110]. Seventy-six percent of those surveyed believed the campaign finance system is either 'broken and needs to be

replaced,' or 'hasproblems and needs to be changed.' *Id.* Three-quarters of those surveyed supported a 'ban on large 'soft money' donations.' *Id.* at 0291.

1.83.7 Plaintiff's expert La Raja notes that

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt—and there has been minimal evidence to prove this claim—there is certainly the appearance of corruption. . . .
>
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw . . . . Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

La Raja Cross Exam. Ex. 3 at 144-45 [JDT Vol. 25].

Summary

1.84 It is clear that the effect of large contributions on the political process has not been lost on the public. The polling surveys entered into the record provide powerful proof that the presence of large donations create the appearance of corruption in the eyes of the majority of Americans. Although Plaintiffs point out that BCRA's new federal limits are considered by Americans to constitute large contributions, the fact remains that nonfederal donations made under FECA were often much larger and therefore would be seen by Americans as more corrupting. Major donors who participate

and witness nonfederal fundraising believe that these donations present at the very least an appearance of corruption. Members of Congress have seen first-hand the cynicism these large, unregulated donations have bred in the minds of their constituents, and acknowledge the appearance of corruption inherent in large contributions made by those interested in legislation as the legislation is being considered by federal lawmakers. While it is not clear whether or not the public understands the exact contours of the campaign finance system and the nonfederal/federal money distinction, it is clear they view large contributions as corrupting.

Nonprofit Groups' Involvement in Federal Elections

1.85 Political parties and federal candidates work with nonprofit groups on campaign activities, and they have raised nonfederal money for, and directed and transferred nonfederal money to nonprofit groups for use in activities that affect federal elections.

1.85.1 The national party committees direct donors to donate nonfederal money to certain interest groups that then use such funds for broadcast issue advertisements and other activities that influence federal elections. For example, Steve Kirsch testifies that the national Democratic Party played an important role in his decision to donate soft money to 'certain interest groups that were running effective ads in the effort to elect Vice-President Gore, such as NARAL. The assumption was that the funds would be used for television ads or some other activity that would make a difference in the Presidential election.' Kirsch Decl. ¶ 10 [DEV 7-Tab 23]; *see also* Buttenwieser Decl. ¶ 18 [DEV 6-Tab 11] ('I estimate that, over the last decade, I have given roughly $2 million to interest groups engaged in political activity, including non-profit corporations. . . . [because I believe the field work they do] can have important effects on political campaigns. I decide which of these groups to give to primarily on my own,

though I have also discussed with DSCC personnel which groups are effective at these grassroots activities.').

1.85.2 The RNC, NRSC, and NRCC have all made nonfederal donations to the National Right to Life Committee, an independent group that assists Republican candidates through 'issue advocacy' activities. Resps. Nat'l Right to Life Pls. To Defs.' First Interrogs., No. 3 [DEV 10-Tab 5]; *see also* RNC0065691A, RNC0065691 [DEV Supp.-Tab 3] (October 18, 1996, letter from the Republican National State Elections Committee to National Right to Life with enclosed $500,000 donation, stating in part '[y]our continued efforts to educate and inform the American public deserves recognition'). After the NRSC's 1994 donation, then-NRSC Chairman Senator Phil Gramm told the *Washington Post* that the party made this donation because it knew the funds would be used on behalf of several specific Republican candidates for the Senate, saying he had 'made a decision . . . to provide some money to help activate pro-life voters in some key states where they would be pivotal to the election.' *Id.* at 5975; *see also* RNC 0373365 [IER Tab 31] (letter from the Republican National State Elections Committee to the American Defense Institute notifying the group of a $300,000 donation from the RNSEC's 'nonfederal component' to assist the group's 'efforts to educate and inform Americans living overseas of their civic responsibilities.'); RNC 0373370, 0373376, 0373381 (three letters to Americans for Tax Reform all dated in October 1996, providing the group $1,000,000, $2,000,000, and $600,000 donations in recognition of the group's 'efforts to educate and inform the American public); Thompson Comm. Report at 4013 (majority report) ('In addition to direct contributions from the RNC to nonprofit groups, the senior leadership of the RNC helped to raise funds for many of the coalition's nonprofit organizations.'); *id.* at 5934 (minority report) ('[T]he Committee received evidence indicating that both political parties suggested to supporters that they make

contributions to sympathetic groups), 5983 ('Tax-exempt 'issue advocacy' groups and other conduits were systematically used to circumvent federal campaign finance laws'.)

1.85.3 The DNC has also made contributions to nonprofit groups to be used on activities that affect federal elections. Marshall Decl. ¶ 9 [DEV 8-Tab 28] (DNC official attesting that '[i]nfrequently, the DNC also makes small contributions to outside groups such as non-profit voter registration and get out the vote organizations focusing their efforts on minority and low-income communities, to assist with these groups' important work in empowering minority and low-income citizens.').

1.85.4 The National Right to Work Committee 'pays for its advertising from its treasury, [and] admits that certain Members of Congress or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising.' Resp. Nat'l Rt. Work Comm. to Defs. First RFAs, No. 17 [DEV 12-Tab 2].

1.85.5 Members of Congress assist nonprofit groups raise funds for the purpose of affecting national elections. Congressman Ric Keller signed a Club for Growth fundraising letter dated July 20, 2001 which credited the Club for his own 2000 electoral success and assured potential donors that their money would be used to 'help Republicans keep control of Congress.' CFG00208-10 [DEV 130-Tab 5]; *see also* NRW-2812 [DEV 129-Tab 2] (letter from Congressman Pete Sessions asking the recipient to meet with National Right to Work Committee personnel regarding the Committee's effort to 'stop Big Labor from seizing control of Congress in November'). Nonprofit groups have influenced the outcome of federal elections.*See* Pennington Decl. ¶¶ 15, 19 [DEV 8-Tab 31] (discussing the Club for Growth's impact on the 2000 Congressional election in Florida's Eighth

District); *see also infra* Findings ¶ ? (Bumpers) ('Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.' Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups.').

1.85.6 Ms. Bowler testifies that most committees that are organized to support or oppose ballot measures in California are organized as 501(c)(4) committees. She states that virtually all of the ballot measure committees in California engage in activity that can be characterized as get-out-the-vote activity under BCRA. Bowler Decl. ¶ 30 [3 PCS]. This fact is undoubtedly known to the CDP as summary judgment was entered against the state political party for its nonfederal contribution to a ballot measure committee which was not reported to the FEC and spent almost entirely on voter registration activities. *See FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment). Judge Garland E. Burrell, Jr. of the Eastern District of California found that on the basis of this conduct the CDP had 'violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats.' *Id.* at 15. This example shows that ballot measure committees engage in voter mobilization efforts that affect federal elections, *see also* Findings ¶¶ 1.28, 1.32, and that permitting nonfederal donations and solicitations to such groups would allow political parties to circumvent BCRA.

1.85.7 'Virtually every member of Congress in a formal leadership position has his or her own 527 group. . . . In all, Public Citizen found 63 current members of Congress who have their own 527s. Another 38 members of Congress have a stake in the Congressional Black Caucus [] 527. 527 groups are also popular with influential congressional committee chairmen. . . . And 527s are increasingly popular with other members of Congress, who want to be more influential. . . .' Public Citizen Congress Watch, Congressional Leaders' Soft

Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 6 [DEV 29-Tab 3]. 'For congressional leaders, 527 groups appear to collect about as much money as their campaign committees and often as much as their leadership PACs.' *Id.* at 9.

1.85.7.1 'There are basically two kinds of 527s active in federal politics: those that exist to promote certain politicians (which Public Citizen calls 'politician 527s') and those that exist to promote certain ideas, interests and partisan orientations in election campaigns. . . . Politician 527s generally serve as soft money arms of 'leadership PACs,' which incumbents use to aid other candidates and otherwise further their own careers. Like the campaign committees of members of Congress, leadership PACs can receive only 'hard money' contributions, which are limited in amounts and may not come directly from corporations or unions. Politician 527s use their soft money mainly to sponsor events that promote their own careers, help create a 'farm team' of successful state and local candidates, and spur partisan 'get-out-the-vote (GOTV)' efforts.' *Id.* at 6.

1.85.7.2 Many donors to Member 527 organizations donate with the intent of influencing federal elections. For example, Peter Buttenwieser testified that in early 2002 he donated $50,000 to a 527 organization, Daschle Democrats, which ran broadcast ads in South Dakota supporting Senator Tom Daschle in response to the attacks that had been made against him. Mr. Buttenwieser stated: 'I was willing to do this because I felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well.' Buttenwieser Decl. ¶ 20 [DEV 6-Tab 11].

1.85.7.3 Twenty-seven industries (including individuals, such as executives, associated with the industries) contributed $100,000 or more in just a single year to the top 25 politician 527 groups. These industries accounted for 52 percent of all contributions to the top 25 politician 527s. The top 10

industries contributing were: computers/Internet, securities & investments, lawyers/law firms, telephone utilities, real estate, TV/movies/music, air transport, tobacco, oil & gas, and building materials and equipment. Top corporate contributors included AT&T, SBC Communications, Philip Morris, Mortgage Insurance Companies of America, Clifford Law Offices, U.S. Tobacco and American Airlines. Overall, only 15 percent of total contributions to the top 25 politician 527's came in amounts of less than $5,000. Democratic party committees and unions also contributed over $100,000 to the top politician 527s. In fact, Democratic party committees (mainly the DNC) were the single largest contributor to politician 527s. Almost all of this money (81 percent) went to the Congressional Black Caucus 527. Public Citizen Congress Watch, Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills, Feb. 26, 2002, at 10-11 [DEV 29-Tab 3].

1.85.8 According to Kathleen Bowler of the CDP, Section 527 organizations include political clubs. The CDP has contributed to these groups 'to assist [them] with very basic administrative and organizational costs, as well as for voter registration activities.' Bowler Decl. ¶ 31. Bowler attests that these groups 'traditionally engaged in grass-roots GOTV activity, they are not engaged in direct activities in connection with federal elections.' *Id.* Similarly,

> CRP for many election cycles has provided and paid for partisan voter registration, through its Operation Bounty program in which Republican County Central Committees, Republican volunteer organizations and Republican candidates for state and federal office may participate, and through supplementary paid voter registration drives. Most of these participating groups and organizations are Internal Revenue Code section 527 organizations.

Erwin Aff. ¶ 9. Since California's state elections are held at the same time as federal elections, GOTV efforts in California will affect federal elections, even if these effects are unintentional. *See supra* Findings ¶ 1.28.

1.86 It is clear that prior to BCRA, the political parties donated nonfederal funds to nonprofit entities which then used those funds to affect federal elections in ways that assisted the political party that donated the money. Furthermore, federal candidates have solicited funds for nonprofit corporations that have assisted them in their campaigns, and donors note that the political parties and federal candidates have directed them to donate to specific nonprofit groups in order to affect federal elections. What the record shows is that BCRA's framers were aware of this budding practice which would become a gaping loophole if not addressed by the campaign finance reform legislation in light of BCRA's other provisions affecting the collection and use of nonfederal funds by the national and state political parties.

The Effect of BCRA on Interest Group Activity

1.87 Experts expect that little of the nonfederal money donations to political parties barred by BCRA will now be made to interest groups. *See* Mann Cross Exam. at 164-65 [JDT Vol 17] ('I think [BCRA] is going to produce a tremendous shift in resources from television to ground activities—registration, mobilization, get out the vote. Yes, some of this will be by interest groups.'); Green Rebuttal Report at 19 [DEV 5-Tab 1] ('I doubt that much of the money that currently goes to parties in the form of soft money will go instead to PACs and other tax-exempt organizations. The money donated to political parties is given with an eye toward the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government. No interest group can approximate the scope or influence of a political party; no interest group has the same presence in the

lives or careers of politicians. It therefore seems unlikely that money seeking access will flow in appreciable quantities to much less propitious interest group destinations.').

1.88 One interest group and one political consultant predict that some nonfederal money donors will donate their money to interest groups. Kate Michelman, President of NARAL, has stated that nonfederal donors seeking to 'elect people who embody their values will be looking to [donate to] groups like NARAL, which do serious political work and are seasoned operatives.' Gallagher Decl. ¶ 61 [RNC Vol. XIII] ('If [nonfederal donors] can't give to the parties . . . they are going to find other means.' (quoting Michelman)). Michael Lux, President and Co-founder of Progressive Strategies, L.L.C., a political consulting firm, testifies that he expects that '[t]here will be organizations who will be able to raise more money because folks who used to give to the party will now give to outside groups. And hopefully I will be involved in many of those projects,' although 'obviously you never know the unintended consequences of specific pieces of legislation'). Lux Dep. at 50-52 and Ex. 2 [RNC Vol. 16].

1.89 One RNC official testifies that she does not believe interest groups can replace political parties. B. Shea Dep. at 90 [JDT Vol. 29] (agreeing that interest groups could never replace political parties).

1.90 Plaintiffs supply the Court with testimony showing that prior to BCRA, interest groups, unlike political parties, were rarely required to make public disclosure of their receipts, donors, disbursements, and activities. *See* Beinecke[70] Decl. ¶¶ 3, 9 [RNC Vol. IX] (prior to BCRA, National Resources Defense Council (NRDC) did not have to file disclosure forms with FEC or disclose to the public amounts donated by foundations); Gallagher Decl. ¶ 15 [RNC Vol. XIII] (prior to

[70] Frances Beinecke is the Executive Director of the NRDC. Beinecke Decl. ¶ 1 [RNC Vol. IX].

BCRA National Abortion and Reproductive Rights Action League (NARAL) was not required to track whether it received donations from persons outside United States); Sease[71] Decl. ¶ 11 [RNC Vol. XIX] (prior to BCRA, Sierra Club was not generally required to report identity of individual donors to any government entity); *see also* Keller[72] Expert Report ¶ 42 [RNC Vol. VIII] (stating that his understanding is that the political activities of interest groups 'are far less transparent than those of parties').

While this may have been the case prior to BCRA, BCRA contains provisions addressing the lack of transparency in interest group political activity. *See* BCRA §§ 201, 212. Therefore, this testimony describes conditions under a different campaign finance regime and does little to assist the Court in determining the impact on campaign finance disclosure of any hypothetical future increase in interest group activity.

1.91 State Republican party officials comment that interest groups engage in voter registration, voter identification, get-out-the-vote activities, and lobbying of officeholders, Dendahl[73] Decl. ¶ 11 [RNC Vol. VIII]; Bennett[74] Decl. ¶ 11 [RNC Vol. VIII] (declaring he has read about such interest group activities in the media). Bruce Benson, the Chairman of the Colorado Republican Party predicts that 'Special Interest Groups will fill the void caused by the reduction in Political Party activity since they will not have to report the unlimited

[71] Deborah Sease is the Legislative Director of the Sierra Club. Sease Decl. ¶ 1 [RNC Vol. XIX].

[72] Morton Keller is an experts for the Plaintiffs.

[73] John Dendahl is the State Chairman of the Republican Party of New Mexico. Dendahl Decl. ¶ 1 [RNC Vol. VIII].

[74] Robert Bennett has served as Chair of the Ohio Republican Party since 1988. Bennett Decl. ¶ 1-2 [RNC Vol. VIII].

contributions from any source they will be able raise and spend.' Benson Decl. ¶ 12 [RNC Vol. VIII].

It appears that Mr. Benson's assessment does not take into account BCRA's new disclosure requirements for certain expenditures made by interest groups. *See* BCRA §§ 201, 212.

1.92 John Peschong, the RNC's Regional Political Director for the Western Region states that 'In recent election cycles, I have observed that some of the major interest groups, such as the AFL-CIO, NEA, CTA, and NAACP, have reduced their reliance on broadcast issue advocacy, and shifted reliance to grassroots voter mobilization activities.' Peschong Decl. ¶¶ 13-14 [RNC Vol. VI].

1.93 During the closing weeks of the 2000 campaign, the NAACP National Voter Fund registered over 200,000 people, put 80 staff in the field, contacted 40,000 people in each target city, promoted a get-out-the-vote hotline, ran three newspaper print ads on issues, made several separate direct mailings, operated telephone banks, and provided grants to affiliated organizations. *See* Green Cross Exam. at 15-20, Ex. 3 [JDT Vol. 9]; McCain Cross Exam. at 70-72 [JDT Vol. 18]. The NAACP reports that the program turned out a million additional black voters and increased turnout (over 1996 numbers) among targeted groups by 22 percent in New York, 50 percent in Florida and 140 percent in Missouri. Green Cross Exam. Ex. 3 [JDT Vol. 9]. The NAACP's effort, which cost approximately $10 million, was funded in large part by a single $7 million donation by an anonymous individual. *Id.* at 20, Ex. 3; McCain Cross Exam. at 73-74 [JDT Vol. 18].

1.94 According to Mary Jane Gallagher, NARAL's Executive Vice President, in 2000, NARAL spent $7.5 million and mobilized 2.1 million pro-choice voters. The group also made 3.4 million phone calls and mailed 4.6 million pieces of election mail. *See* Gallagher Decl. ¶ 24 [RNC Vol. XIII].

1.95 I find the effect BCRA will have on interest group activity unclear. While testimony in the record reveals that some nonfederal donations that went to the national political parties under FECA, and are now barred under BCRA, will go to interest groups, no witness has provided an assessment as to how much nonfederal money will be redirected to interest groups. Furthermore, the evidence regarding the lack of transparency with regard to interest group political activity does not take into account BCRA's new disclosure requirements that apply to such activities, and therefore is not helpful to the Court.

State Party Fundraising

Fundraising By National Party Officials & Federal Officeholders for State Parties

1.96 According to RNC officials, the RNC provides financial and fundraising assistance to state and local candidates and parties through a variety of means. *See* Dendahl Decl. ¶ 10 [RNC Vol. VIII]; Duncan Decl. ¶ 13 [RNC Vol. VI]; Josefiak Decl. ¶ 44, 65-72 [RNC Vol. I]; B. Shea Decl. ¶¶ 32-40 [RNC Vol. V]; *see also* La Raja Expert Report ¶ 12(b) [RNC Vol. VII] (discussing national party support for state parties generally). For example, RNC officers have sent fundraising letters on behalf of state and local candidates during off-year election cycles. *See, e.g.*, RNC Ex. 292 (RNC 0332976) (fundraising letter signed by Deputy RNC Chairman Jack Oliver on behalf of Bret Schundler's New Jersey gubernatorial campaign); Josefiak Decl. RNC Ex. 1162 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of George Allen's Virginia gubernatorial campaign); Josefiak Decl. RNC Ex. 1766 [RNC Vol. I] (fundraising letter signed by Haley Barbour on behalf of New Jersey Republican Party); Feingold Dep. Ex. 12 [JDT Vol. 6] (fundraising letter from Jim Nicholson on behalf of Norm Coleman's Minneapolis mayoral campaign). Robert Duncan, current General Counsel and former Treasurer of the RNC, was

actively involved in fundraising activities for the Republican Party of Kentucky and for Kentucky state candidates. He sponsored receptions and hosted and attended fundraising dinners in support of the Kentucky Republican Party. Duncan Decl. ¶ ¶ 5-6 [RNC Vol. VI].

The RNC states that prior to BCRA,

> RNC officers were intimately and substantially involved in helping state and local candidates raise money in accordance with state and federal law. Since becoming Chairman of the RNC in February 2002, Marc Racicot has made 82 trips in his capacity as Chairman to 67 cites in 36 states. Virtually all of these trips have involved assisting state and local parties and candidates with fundraising. *See* Josefiak Decl. ¶ 70. RNC Co-Chairwoman Ann Wagner and Deputy Chairman Jack Oliver have made 31 and 33 trips respectively since becoming RNC officers, the majority of which involved providing fundraising assistance to state and local parties and candidates. *Id.* For example, Ann Wagner was the keynote speaker at a fundraising dinner for the Shelby County Tennessee Republican Women's Club on September 8, 2001. *See* RNC Exh. 301.

RNC Proposed Findings of Fact ¶ 42. However, the Josefiak Declaration upon which the RNC relies does not support its contention. Josefiak only states that the 'majority of these trips have had significant fundraising components to them,' Josefiak Decl. ¶ 70 [RNC Vol. I]; he says nothing about the type of fundraising accomplished during these trips. Only one of these 146 trips is documented to have been for the purposes of state or local party fundraising. *See* RNC Ex. 301.

Nothing prevents RNC officials from raising federal funds for state candidates. *See* BCRA § 101(a); FECA § 323(a); 2 U.S.C. § 441i(a) (barring officers of agents of national

political party committees from soliciting or directing contributions 'that are not subject to the limitations, prohibitions, and reporting requirements of this Act.').

1.97 Senator McConnell attests that he engages in fundraising activities for state and local candidates, such as speaking at a state party fundraiser or attending a candidate rally. McConnell Aff. ¶ 5 [2 PCS]. Under BCRA, Senator McConnell may continue 'to attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party.' BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441i(e)(3).

CDP and CRP Fundraising

1.98 The CDP and the CRP present evidence regarding their general fundraising activities and claim that BCRA will adversely affect their revenues. *See* Bowler Decl. ¶¶ 10, 12, 19, 23, 35 & Ex. A [3 PCS] (discussing CDP's federal and nonfederal fundraising achievements, methods, and difficulties, and the impact BCRA will have on CDP fundraising); Torres Decl. ¶ 9 [3 PCS] (discussing the effect of BCRA on CDP fundraising and therefore CDP activities); Erwin Aff. ¶¶ 12, 13, 15(a) & CDP App. at 1189 [3 PCS] (discussing CRP's fundraising programs and activities and the effect BCRA will have on these activities). These claims, however, are speculative and not based on any analysis. Bowler Dep. at 9-14 [JDT Vol. 3] (acknowledging that the CDP had not discussed any strategies for changing either its fundraising or operational activities to adjust to the requirements of the BCRA, that no one at the CDP had talked with any strategists or consultants with respect to ways in which the party might change either its fundraising or operational activities in response to the BCRA, and acknowledging that CDP's assessment of BCRA's effect was based on an analysis on how the law would have affected their past fundraising without looking at different ways money could have been raised); Erwin Dep. at 131-40 [JDT

Vol. 5] (admitting the CRP did not conduct an analysis of how it would change its fundraising or operations to adapt to BCRA, that the party does not 'know what the ramifications' of BCRA will be on its fundraising receipts, and that he does not know how much of the nonfederal money that was collected by the national parties will now be directed at the CRP); *see also* Philp Dep. at 18-22 [JDT Vol. 26] (testifying that the Colorado Republican Party has done no formal analysis to determine BCRA's effect on the political party's revenue flow, and has not consulted with fundraising experts to determine different ways to fundraise under BCRA).

Furthermore, since the state political parties collect many donations in small increments, they could be classified as either federal or nonfederal contributions. No party has provided the three-judge panel with analysis taking this fact into account. The CDP and CRP also present testimony and documentary evidence concerning the effect the Levin Amendment will have had on their nonfederal fundraising. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS]; Torres Decl. ¶ 7 [3 PCS]; Erwin Aff. ¶ 13 [3 PCS]. In addition to not being the product of a serious, forward-looking analysis, the testimony is not sufficiently precise and leaves as many questions as it answers. For example, the CDP's evidence regarding the impact of the Levin amendment on its nonfederal money fundraising does not make clear if the amount of funds it claims will be 'reduced' includes the initial $10,000 of these donations which are permitted to be used for federal election activity under BCRA, or deducts those sums to present a more accurate calculation. *See* Bowler Decl. ¶ 19 & Ex. A [3 PCS].

Finally, Plaintiffs' own expert Raymond La Raja finds that 'new rules that limit soft money fundraising will not present a problem for parties already constrained by similar limits under state law.' La Raja Cross Exam. Ex. 3 at 148 [JDT Vol. 15] (La Raja dissertation). He notes that 'in states where

campaigns are expensive and where parties rely on major donors' such measures 'will hamper party activity and create some confusion. . . . Although state parties will adapt, the middling and weaker state parties might suffer the most. . . .' *Id.* However, he concludes that the '[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime.' *Id.* at 150.

As such, I find the CDP and CRP's analysis of BCRA's impact on their fundraising activities speculative and lacking probative value.

1.99 The amount of nonfederal money the CRP and CDP raise themselves is much more than the nonfederal funds they receive from transfers from the national parties. CDP/CRP 1171 [3 PCS] (in the 2000 election cycle, 19.1 percent of all CRP nonfederal money came from national party transfers); CDP/CRP 35, 37, 39 [3 PCS] (in 2000, 36 percent of all CDP nonfederal money was from national party transfers). Ms. Bowler states, however, that 'the percentage of 'soft money' falling into this category would vary from state to state, as well as by election cycle . . .' Bowler Rebuttal Decl. ¶ 3 [3 PCS].

1.99.1 According to Ms. Bowler '[t]he majority of [national transfers] were for issue advocacy, although money has been transferred for voter registration, get-out-the-vote activities, and even administrative expenses. We are able to raise a substantial amount of money for our non-Federal activities and do not rely on national party transfers for those purposes.' Bowler Decl. ¶ 16 [3 PCS]; *see also id.* ¶ 12 (explaining that in the 1999-2000 cycle, the CDP raised $15,617,002 in nonfederal funds, which it used to fund state and local activities); Bowler Rebuttal Decl. ¶ 4 [3 PCS] (explaining that the CDP pays for much of its voter registration and get-out-the-vote activities with money raised by the state party). To the extent the CDP uses its nonfederal

funds for purely state campaign activity, BCRA has no effect on such expenditures. As noted *supra,* Findings ¶ 1.28, 1.32, GOTV and voter registration activities affect federal elections in states like California that hold their state and local elections in conjunction with federal elections. As such, these activities could be paid for with federal funds or with an FEC-specified allocated mix of federal and nonfederal funds (raised pursuant to the Levin Amendment). *See* BCRA § 101; FECA § 323(b)(2)(a)-(c); 2 U.S.C. 441i(b)(2)(a)-(c).

TITLE II: ELECTIONEERING COMMUNICATIONS THAT AFFECT FEDERAL ELECTIONS

2.1 *The Origins of the Problem Congress Sought to Solve With Title II*

Federal law has long prohibited corporations and labor unions from spending general treasury funds in connection with a federal election. The Supreme Court's interpretation of FECA in a series of cases beginning in 1976 has limited FECA's control over corporate and labor union involvement with federal elections. Prior to BCRA, corporations and labor unions exploited these limitations and spent general treasury funds in massive amounts to influence federal elections with 'issue advertising' campaigns.

2.1.1 In *FEC v. Massachusetts Citizens for Life, Inc.,* the Supreme Court held that the prohibition on corporations and labor unions using general treasury funds on expenditures in connection with a federal election was overbroad, narrowing the restriction to corporate and union spending on 'express advocacy.' *FEC v. Massachusetts Citizens for Life, Inc.* ('*MCFL*'), 479 U.S. 238, 249 (1986) ('We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.'). In *Buckley,* the Supreme Court provided examples of express advocacy: ''vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'' *Buckley,* 424 U.S. at 44 n.52. These examples have been referred to as the

'magic words' because if they are invoked by an organization, they trigger FECA's limitations.

2.1.2 As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures[75] did not contain words of 'express advocacy.' In other words, corporations and labor unions could use their general treasury funds to pay for an advertisement which influenced a federal election, provided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement. Magleby Expert Report at 5-6, 9, 10 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2].

2.2 *The Rise of Issue Advocacy Campaigns Funded by Corporate & Labor Union General Treasuries*

Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections.

2.2.1 The Annenberg Center for Public Policy has been studying issue advocacy since the early 1990s. *See* Annenberg Public Policy Center, Issue Advocacy Advertising During the 1999-2000 Election Cycle ('Annenberg Report 2001') at 1 [DEV 38 Tab-22]. In addition to Defendants, Plaintiffs and their experts have cited to and included the Annenberg Study in their materials, and have not specifically challenged any of the Center's findings. *See, e.g.*, NRA 196 [11 PCS]; La Raja Decl. ¶¶ 24(h) [RNC Vol. VII] (quoting Annenberg Study), ¶ 20(b) & Figure 10 (quoting Annenberg

[75] As discussed, *supra*, independent expenditures differ from coordinated expenditures in that coordinated expenditures are treated as contributions under FECA.

data); Milkis[76] Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Study). *See also infra* App. ¶¶ I.B.1-I.B.6. Congress also relied on the Annenberg studies. 147 Cong. Rec. S2455 (daily ed. March 19, 2001) (statement of Sen. Olympia Snowe) ('Let there be no mistake. The record I intend to outline will show these advertisements constitute campaigning every bit as much as any advertisements run by candidates themselves or any ad currently considered to be express advocacy and therefore subject to Federal election laws.'); *id.* at 2456 (statement of Sen. Olympia Snowe) (citing Annenberg Report 2001). Accordingly, I rely on the Annenberg Center's results as uncontroverted evidence.

2.2.2 According to the Annenberg Center's research, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Annenberg Report 2001 at 13. 'Candidate-centered advertisements make a case for or against a candidate but do so without the use of the ten words delineated in *Buckley*.' *Id.* (noting that these advertisements 'usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position.'). Legislation-centered advertisements 'seek to mobilize constituents or

[76] Other commentators have referred to two types of advertisements: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as 'true' or 'genuine' issue advertisements, while those issue advertisements designed to influence a federal elections are known as 'electioneering' or 'candidate-centered' issue advertisements. Krasno and Sorauf Expert Report at 65 [DEV 1-Tab 2] ('Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.').

policy makers in support of or in opposition to pending legislation or regulatory policy.' *Id.* (noting that these advertisements usually mention specific, pending legislation). Finally, general image-centered advertisements are 'broadly written to enhance the visibility of an organization or its issue positions, but are not tied directly to a pending legislative or regulatory issue.' *Id.*[77] Throughout the Findings and my opinion. I will generally use the nomenclature candidate-centered issue advertisements (or electioneering issue advertisements) and genuine or pure issue advertisements. Genuine issue advertisements include both legislation-centered and general image-centered issue advertisements.

2.2.3 In discussing the 1999-2000 election cycle, the Annenberg Center found that '[t]he type of issue ad that dominated depended greatly on how close we were to the general election. . . . Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent [of] candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate*.' *Id.* at 14 (emphasis added).

[77] Other commentators have referred to two types of advertisements: candidate-centered (also called electioneering) issue advertisements and genuine issue advertisements. Advertisements designed to genuinely influence debate over a particular issue are known as 'true' or 'genuine' issue advertisements, while those issue advertisements designed to influence a federal elections are known as 'electioneering' or 'candidate-centered' issue advertisements. Krasno and Sorauf Expert Report at 65 [DEV 1-Tab 2] ('Advertising data show that there are two distinct types of issue ads, those that are basically candidate-oriented and electioneering in nature, and those that only present or urge action on an issue. The former are nearly identical in format, structure, and timing to ads produced by candidates, while the latter bear little or no resemblance to electioneering.').

2.2.4 Overall, the Annenberg Center concludes that '[o]ver the last three election cycles the numbers of ads, groups, and dollars spent on issue advocacy has climbed.' *Id.* at 1. During the 1996 election cycle, the Annenberg Center estimated that $135 million to $150 million was spent on multiple broadcasts of about 100 advertisements. Annenberg Report 2001 at 1 [DEV38-Tab 22]. In the next election cycle (1997-1998), the Annenberg Center found that 77 organizations aired 423 advertisements at a cost of between $250 million and $340 million. *Id.*[78] In the 1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.* For the 1999-2000 election cycle, the Republican and Democratic parties accounted for almost $162 million (31%) of this spending; Citizens for Better Medicare, $65 million (13%); Coalition to Protect America's Health Care, $30 million (6%); U.S. Chamber of Commerce, $25.5 million (5%); AFL-CIO, $21.1 million (4%); National Rifle Association, $20 million (4%); U.S. Term Limits, $20 million (4%). *Id.* These groups and the two parties accounted for two out of every three (67%) dollars spent on issue ads in the 2000 cycle. *Id.* (noting that other groups spent a combined $166.2 million (33%) on issue advocacy during the 1999-2000 election cycle); *see also* La Raja Decl. ¶ 20(b) & Figure 10 [RNC Vol. VII] (quoting Annenberg data and noting that '[t]hese figures ... closely match my own data on party-based issue ads collected by examining financial reports filed with the FEC').

2.2.5 In addition to the spectacular rise in candidate-centered issue advertising, political scientists and experts

[78] The report the Annenberg Study produced following the 1997-1998 election cycle placed this estimate at between $275 million to $340 million. Annenberg Public Policy Center, Issue Advocacy Advertising During the 1997-1998 Election Cycle ('Annenberg Report 1998') at 1 [DEV 66-Tab 6].

testify that by the 2000 election cycle, PAC interest groups ran dramatically fewer advertisements that referred to a federal candidate than non-PAC interest groups.

2.2.5.1 Political Scientist Anthony Corrado found that one of the 'most notable direct consequences of the FECA' was the 'proliferation of PACs.' Anthony Corrado, *A History of Federal Campaign Finance Law* at 18 [DEV 29-Tab 17]. Corrado's historical research concludes that 'from 1974 to 1986, the number of committees registered with the FEC increased from 1,146 to 4,157, while the amounts they contributed to candidates rose from about $12.5 million to $105 million.' *Id.* Corrado determined that campaign finance regulation was a major factor in the growth of PACs. *Id.* 'The FECA sanctioned PACs, and groups and organizations had an incentive to form PACs since the law established a higher contribution limit for PACs than for individual donors.' *Id.* at 18-19; *see also* Keller Decl. ¶¶ 57 [RNC Vol. VIII] ('[T]he unintended consequences of previous campaign finance legislation [has been] the growth of PACs and more powerful advocacy and interest groups.'), 42 ('Political action committees (PACs) have rapidly grown in numbers.'); Milkis Decl. ¶ 34 [RNC Vol. VII] ('Consequently, during the 1970s, the number of Political Action Committees (PACs) exploded.').

2.2.5.2 Defendants' expert Magleby finds that by the 2000 election cycle, the number of PACs had increased to only 4,499. Magleby Expert Report at 16 [DEV 4-Tab 8]. Plaintiffs' expert Keller notes that by March 31, 2002, the number of federal PACs had dropped to 4,328. Keller Decl. ¶ 42 [RNC Vol. VIII]; *see also* Milkis Decl. ¶ 35 [RNC Vol. VII] (same). By the 2000 election cycle, *non*-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, compared to *only* 3,663 by interest group PACs. Goldstein Expert Report at 10 [DEV 3-Tab 7] (Table 1B); *see also* Rosenthal Decl. ¶ 25 (discussing that since 1995

the AFL-CIO's PAC has not made any independent expenditures); *cf.* Magleby Report at 14-15 [DEV 4-Tab 8] ('If parties and interest groups can effectively communicate a 'vote for' or 'vote against' message with party soft money and electioneering advocacy money, as the studies show they can, then it is not surprising that we have seen so much growth in this form of campaigning in recent election cycles.').

2.2.6 After studying the dramatic rise of candidate-centered issue advertisements over a seven year period, the Annenberg Center concluded *inter alia* that:

> 1) The amount of money spent on 'issue advocacy' is rising rapidly.
>
> 2) Instead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice.
>
> 3) The distinction between issue advocacy and express advocacy is a fiction.
>
> 4) Issue advocacy masks the identity of some key players and by so doing, it deprives citizens of information about source of messages which research tells us is a vital part of assessing message credibility.

Annenberg Report 2001 at 1 [DEV 38-Tab 22]. As Plaintiffs' expert Raymond J. La Raja states, ''Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent.'' La Raja Decl. ¶ 24(h) [RNC Vol. VII] (quoting Annenberg Report 2001 at 1).

2.2.7 It is therefore uncontroverted that '[b]y the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using

the magic words and thus avoid disclosure requirements, contribution limits and source limits.' Magleby Expert Report at 10 [DEV 4-Tab 8]. Political consultant Douglas L. Bailey explained why it was not until the 1996 election cycle that corporations and labor unions began to make heavy use of issue advocacy as a tool of electioneering. Political consultant Bailey testifies:

> When I consulted on dozens of campaigns in the 1970s and 1980s, we operated under essentially the same set of rules that governed in 1996, but many of today's practices would have been considered dangerous and wrong then, both politically and legally. In the post-Watergate era, we were worried about not only obeying the rules, but also assuring that our clients were seen as trying to clean up the image of the political process. But due to a lack of enforcement and a willingness on the part of some to win at all costs, these concerns appear to have dissipated.

Bailey Decl. ¶ 14 [DEV 6-Tab 2].

2.2.8 As this section illustrates, the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.

2.3 *Express Advocacy Not Widely Used Nor An Effective Means of Campaign Advertising*

Exacerbating this development, is the undisputed fact that the overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations. It is also uncontroverted that political consultants do not employ express advocacy when making campaign advertisements because they do not view it as an effective means of campaign advertising. As a result,

corporations and labor unions are able to pay for the most effective form of political advertisements when seeking to influence federal elections.

2.3.1 Empirical study demonstrates that modern campaign advertisements do not use words of express advocacy. Dr. Goldstein finds, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test during the 2000 federal election. Goldstein Amended Expert Report at 16 [DEV 3-Tab 7]. Conversely, 88.6 percent of candidate advertisements in 2000 'were technically undetected by the *Buckley* magic words test.' *Id.* This result demonstrates 'that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue.' *Id.* Former Senator Rudman confirmed these empirical results observing that '[m]any, if not most, campaign ads run by parties and by candidates themselves never use . . . 'magic words.' It is unnecessary.' Rudman Decl. ¶ 18 [DEV 8-Tab 34].

2.3.2 The uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements. The political consultants' testimony, which I adopt as part of my Findings, is worth repeating *in toto;* particularly given the fact that the testimony of these political consultants is uncontroverted on these points and is not rebutted by the production of *any* contrary political consultant testimony by Plaintiffs discussing this subject.

Republican Political Consultant Douglas L. Bailey [79]

> In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.' If I am designing an ad and want the conclusion to be the number '20,' I would use the ad to count from 1 to 19. I would lead the viewer to think '20,' but I would never say it. All advertising professionals understand that the most effective advertising leads the viewer to his or her own conclusion without forcing it down their throat. This is especially true of political advertising, because people are generally very skeptical of claims made by or about politicians.
>
> Contrary to what many people would like to believe, it is well known among campaign consultants that the 'swing voters' who regularly determine the outcome of elections usually vote on candidate personalities, rather than issues. Regardless of the substantive topic of any particular ad, one of the single most important message [sic] that a political ad can convey is the underlying sentiment that a candidate has values similar to or

[79] In 1968, Bailey founded Bailey, Deardourff & Associates, which was among the first national political consulting firms, working for Republican candidates for Governor, Congress, Senate, and President. The firm's clients included Gerald Ford's Presidential Campaign, and over fifty successful campaigns for Governor or the United States Senate in 17 states. Bailey Decl. ¶ 1 [DEV 6-Tab 2]. As campaign consultant, Bailey's job was 'to plan the campaign and then create broadcast advertisements that would shape its outcome.' *Id.* ¶ 2. In 2000, Bailey was among the first eight recipients of the American University-Campaign Management Institute's 'Outstanding Contribution to Campaign Consulting Award given to the consultants 'who have best represented the ideals of the profession and shown concern for the consequences of campaigns on public attitudes about our democratic process.' *Id.* Bailey also has done work for political parties and issue advocacy groups. *Id.* ¶¶ 9-12.

> different than the target viewers of the ad. A campaign commercial is most effective if the candidate is perceived as likeable to the citizens relaxing in their living rooms, and if the viewers feel comfortable that the candidate shares their values. Often, the substantive issue is merely the vehicle used to demonstrate personal qualities.
>
> In the era of the 30 second ad, it is a mistake to view any particular electioneering advertisement as a campaign in and of itself. Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign. Thirty second campaign ads, therefore, must be viewed collectively. It is impossible for the political ad consultant to truly close a positive sale until after he has had time to build the candidate's image through a series of 30 second spots.
>
> Even if an electioneering ad aired in August, September, or October used words such as 'vote for,' 'support,' or 'cast your ballot,' it would do little good. People's minds may change from day to day about how they intend to vote, or more likely, they aren't significantly focused on whom to vote for until the days immediately prior to the election. Thus, the only real sale date is on election day in November. In the months leading up to that 'sale date,' the most important positive thing an ad can do is to create a general impression of a candidate that the voters will internalize over time, and that will hopefully sink in by election day.
>
> Even if the goal of an early-September electioneering ad were to make a direct pitch for a vote, it would be nearly impossible to do it effectively. It is amazing how

> short thirty seconds really is when you are trying to craft a political ad. There is barely enough time to effectively convey a single theme. If you change course in the final five seconds of an ad, you may undo everything that you have attempted to accomplish in the previous 25 seconds. Therefore, it is uncommon that you would see a political advertisement on television that says 'Candidate X is tough on crime' and then breaks that flow and switches to the entirely separate point of' Please vote for Candidate X.'

Bailey Decl. ¶¶ 3-4, 6-8 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother [80]

> [M]edia consultants prefer putting across electioneering messages without using words such as 'vote for.' Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less effective to instruct viewers what you want them to do. They have to come to their own conclusion. Americans like to think they make up their own minds and determine their own fate. Without even mentioning an upcoming election, the media consultant can count on the electoral context and voters' awareness that the election is coming. Voters will themselves link your ad

[80] Strother is a political consultant, and President and founder of Strother/Duffy/Strother. Strother Decl. ¶ 1 [DEV 9-Tab 40]. He is also Chairman of the Board of the American Association of Political Consultants, and last year served as its President. *Id.* Since 1967, he has worked for more than 300 campaigns. *Id.* Representative clients at the presidential, congressional, and gubernatorial levels have included Lloyd Bentsen, Paul Simon, Gary Hart, Bill Clinton, Al Gore, Mary Landrieu, and Zell Miller. *Id.* In the last two decades alone, his firm has 'helped elect candidates in 44 states and five countries, including 13 Senators, 8 Governors, and scores of Congress members. [His firm has] won more Democratic Primaries than any other firm.' *Id.*

> to the upcoming election. When viewed months or years after the election a particular ad might look like pure issue advocacy unrelated to a federal election. However, during the election, political ads-whether candidate ads, sham issue ads, true issue ads, positive ads, negative ads or whatever-are each seen by voters as just one more ingredient thrown into a big cajun stew. Thus, there is precious little difference in how you go about crafting 'issue ads' and candidate ads.

Strother Decl. ¶ 4 [DEV 9-Tab 40]. During the cross-examination period, Strother made another observation:

> What you're trying to do is give people enough information [sic] they can make up their own minds. Of course, you're leading them to make up their minds in one direction, but I don't call that hard sale. People tend not to vote for issues anyway, most of the time. They tend to vote for the individual, and they measure the individual by issues.

Strother Cross Exam. at 43 [JDT Vol. 32]; *see also id.* at 44 (observing that 90% of candidate advertisements Strother has put together in his career have *not* used express advocacy).

2.3.3 Unrebutted expert testimony confirms the view of political consultants. Krasno and Sorauf state th[illegible]

> the practices of political advertisers are not dissimilar from those of commercial advertisers. Car ads rarely exhort viewers to 'buy' a Chevrolet, nor do soft drink ads urge people to 'drink' their product. The most aggressive ads usually urge viewers to do no more than call or visit a website for information. . . . This atmospheric approach to commercial advertising-where the product is presented in various desirable tableaus-has become increasingly popular. It serves the general strategy of advertisers to present viewers with a variety of reasons to choose their product, hoping that they will

> latch onto one. Too heavy-handed an approach might interfere with this process by raising viewers' defenses. Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls. That may or may not be an effective approach, but it is the one that advertisers use and that regulators and courts must reckon with.

Krasno and Sorauf Expert Report at 54 [DEV 1-Tab 2] (footnote omitted); *see also* Magleby Report at 15 [DEV 4-Tab 8] ('The absence of magic words in electoral communications does not impede the ability of media consultants to craft an electioneering message. In fact, candidates rarely use the magic words in their own ads.').

2.4 *Current Federal Law Does Not Distinguish Between Pure Issue Advertisements and Candidate-Centered Issue Advertisements* Not only are words of express advocacy uncommon and ineffective in campaign advertising, it is also undisputed that they are ineffective criteria for distinguishing between genuine issue advertisements and advertisements that do not use express advocacy but are designed to influence a federal election.

2.4.1 Experts provided uncontroverted testimony to support this point. 'The 'magic words' defined in *Buckley v. Valeo* do not provide an effective way to determine whether advertisements have the purpose and/or effect of supporting or opposing particular candidates.' Magleby Report at 5 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 58 [DEV 1-Tab 2] ('The magic words test, however, does not distinguish between [pure issue advertisements and candidate-oriented issue advertisements]; indeed it does not distinguish between ads sponsored by candidates and any type of issue ad, or even between political and commercial advertising. Whatever its utility might once have been, this standard is now irrelevant to how political ads are designed.').

2.4.2 Present and former officeholders and candidates likewise provide uncontroverted testimony that 'magic words' do not distinguish pure issue advertisements from candidate-centered issue advertisements. 147 Cong. Rec. S3072 (2001) (Senator Russ Feingold) ('People didn't need to hear the so-called magic words to know what these ads were really all about.'); 147 Cong. Rec. S3036 (Senator John McCain) ('[W]e can demonstrate that the Court's definition of'express advocacy'-magic words-has no real bearing in today's world of campaign ads.'). Senator Carl Levin made the following statement on the floor of the Senate in 1998:

> To show the absurd state of the law, at least in some circuits, we can just look at one of the 1996 televised ads that was paid for by the League of Conservation Voters and which referred to House Member Greg Ganske, a Republican Congressman from Iowa, who was then up for reelection. This is the way the ad read:
>
> > *It's our land; our water. America's environment must be protected. But in just 18 months, Congressman Ganske has voted 12 out of 12 times to weaken environmental protections. Congressman Ganske even voted to let corporations continue releasing cancer-causing pollutants into our air. Congressman Ganske voted for the big corporations who lobbied these bills and gave him thousands of dollars in contributions. Call Congressman Ganske. Tell him to protect America's environment. For our families. For our future.*
>
> The ad sponsor claimed that was an issue ad, an ad that discussed issues rather than a candidate, and so could be paid for by unlimited and undisclosed funds. If one word were changed, if instead of 'Call Congressman Ganske,' the ad said, 'Defeat Congressman Ganske,' it would clearly qualify as a candidate ad subject to contribution limits and

> disclosure requirements. In the real world, that one word difference doesn't change the character or substance of that ad at all. Both versions unmistakably advocate the defeat of Congressman Ganske.

144 Cong. Rec. S10073 (1998) (Senator Carl Levin) (advertisement text in italics); *see also* Decl. of Elaine Bloom ¶ 5 [DEV 6-Tab 7] ('In my experience in campaigns for federal, state and local office, including my involvement in the television advertising we ran in my race for Congress, no particular words of advocacy are needed for an ad to influence the outcome of an election. Many so-called 'issue ads' are run in order to affect election results.').[81] As former Senator Dale Bumpers testifies:

> Soft money also finds its way into our system through so-called 'issue advertisements' sponsored by outside organizations that mostly air right before an election. Organizations can run effective issue ads that benefit a candidate without coordinating with that candidate. They have experienced professionals analyze a race and reinforce what a candidate is saying. These ads influence the outcome of elections by simply stating 'tell him [the

[81] Elain Bloom is currently engaged in consulting, public speaking, and community activities. Bloom Decl. ¶ 2 [DEV 6-Tab 7]. In 2001, Bloom was a candidate for Mayor of Miami Beach, Florida. *Id.* In 2000, Bloom was the Democratic candidate in the general election to represent Florida's 22nd Congressional District, running against the incumbent Republican Clay Shaw, who had served in Congress for nearly 20 years. *Id* (Shaw won the race by approximately 500 votes out of over 200,000 cast). Prior to the 2000 race, Bloom served as a member of the Florida House of Representatives for over 18 years, from 1974 to 1978 (representing Northeast Dade County) and from 1986-2000 (representing Miami Beach and Miami). *Id.* Bloom was Speaker Pro- Tempore of the Florida House from 1992 to 1994, and also served as chair of several legislative committees, including the Health Care Committee, the Joint Legislative Management Committee, the Joint Legislative Auditing Committee, and the Tourism and Cultural Affairs Committee. *Id.*

> opponent] to quit doing this.' The 'magic words' test is completely inadequate; viewers get the message to vote against someone, even though the ad may never explicitly say 'vote-against-him.'

Bumpers Decl. ¶ 26 [DEV 6-Tab 10]; *see also* Chapin Decl. ¶ 7 [DEV 6-Tab 12] ('Based on my experience in campaigns for federal and local office, including the television advertising we ran in my races for County Chairman and Congress, I am familiar with political campaign ads. No particular words of advocacy are needed in order for an ad to influence the outcome of an election.').[82] Congressman Christopher Shays, a Defendant-Intervenor, testifies:

> Although the Supreme Court has identified a limited category of 'magic words' that make an advertisement a campaign advertisement, my experience as a candidate and a Member of the House is that this limited test is inadequate to identify campaign ads. Campaign ads need not include phrases such as 'vote for,' 're-elect' or 'vote against' to be effective campaign tools, and the practice of large numbers of so-called 'issue ads' before an election proves it.

Shays Decl. ¶ 12 [DEV 8-Tab 35].

[82] Since early 2001, Linda Chapin has been the Director of the Metropolitan Center for Regional Studies at the University of Central Florida. Chapin Decl. ¶ 2 [DEV 6-Tab 12]. Chapin was the Democratic candidate in the 2000 general election to represent Florida's Eighth Congressional District, which was an open-seat race. *Id.* ¶ 4. In the November 2000 general election, her Republican opponent received about 51% of the votes cast, and Chapin received about 49% of the votes cast. *Id.* ¶ 4. From 1998 to 2000, Chapin directed the Orange County (Florida) Clerk's Office. *Id.* ¶ 2. Prior to that, Chapin was elected to two successive four- year terms, in 1990 and 1994, as County Chairman of Orange County. *Id.* The County Chairman is a strong executive position roughly equivalent to a mayoral office. *Id.* Prior to her tenure as County Chairman, she was elected to a four-year term on the Orange County Commission in 1986.

2.4.2.1 Federal officeholders and candidates also testify that, based on their experience, the intent behind issue advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election. Chapin Dep. at 27 [JDT Vol. 5] ('It's possible that you could debate the [fact that issue advertisements run within 60 days of an election can be both intended to influence the outcome of an election and intended to promote a particular perspective on a particular public policy issue], but in my experience those ads are almost entirely intended to influence the outcome of an election.'); *see also* Paul Dep. at 27-28 [JDT Vol. 25] (Plaintiff Congressman Ron Paul testifying that the outside group issue ads run in his 2000 Congressional campaign were intended to influence the election.).

2.4.3 The uncontroverted testimony of political consultants confirms that there is no difference between campaign advertisements that contain words of express advocacy and candidate-centered issue advertisements that are designed to influence federal elections but that do not use the 'magic words' of *Buckley*. Consequently, it is uncontroverted that political consultants are able to easily create advertisements designed to influence federal elections that do not use words of express advocacy, and therefore, can be paid for with funds from prohibited sources (corporation and labor union general treasury funds).

Republican Political Consultant Douglas L. Bailey

> The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at best a historical anachronism. When I first entered this business, and up through the mid-1980s, we were regularly able to purchase five minute slots of air time. In a five minute spot, I could introduce a candidate, bring the viewer to a

> comfort level with the candidate, cover a few different substantive issues, and at the end, have the candidate make a direct appeal for a vote. In this by-gone era, it made sense for a candidate to appeal directly for votes using words such as 'vote for,' 'support,' or'cast your ballot' on the basis of a more full or substantive story told in a five minute time period. By contrast, in a 30 second ad, there is not enough time to make a positive direct sale.

Bailey Decl. ¶ 5 [DEV 6-Tab 2].

Democrat Political Consultant Raymond Strother

> Because it is so easy for consultants in my business to make ads that will influence federal elections without triggering the need to use hard dollars to pay for them, the difference between hard money and soft money is a joke. If I want to use soft money to influence an election, there is no real difference in what I do to create the ad. The only thing that is different is the tag line at the end. From the point of view of a media consultant, there is no real difference between ending an advertisement with 'Vote for Senator X' versus ending an advertisement with 'Tell Senator X to continue working hard for America's families.' The public simply does not differentiate between ads that are otherwise identical, but contain these slightly different tag lines at the very end.
>
> When we design, produce, and run 'issue ads' that mention specific candidates for federal office and that are aired in proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election. To call these ads 'issue ads' is a sham. We know that these ads have been paid for with soft money; we know why we have been hired; and we know how easy it is to make sham issue ads that comply with the law, but nevertheless affect federal elections. We know

this even without explicit instructions from our clients. Any media consultant who says otherwise isn't telling the truth. This is what everyone in the business does and you know what you are supposed to produce. It is playing within the current set of rules, but these rules need to be changed.

One common trick that makes the job of creating sham issue ads even easier is the two-camera candidate shoot. Sometimes, the media consultant for the candidate's campaign committee will shoot the film and sell it to the media consultant for a third party for a reasonable rate. They simply take 2 cameras on a shoot when they are filming the candidate's ad. Camera A shoots the footage for the candidate's ad, and Camera B takes nearly identical footage that is then sold to other media consultants for a nominal fee. The media consultant for the third party just has to buy the film from Camera B and put on a clever tag line at the end. In this way, the candidate's media consultant gets direct control over the images of the candidate used in the issue groups' ads.

Strother Decl. ¶¶ 3, 8, 11 [DEV 9-Tab 40].

Republican Political Consultant Rocky Pennington

Many soft money ads that avoid the magic words are clearly intended to affect federal elections. Parties and interest groups would not spend hundreds of thousands of dollars to runs [sic] these ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after. The usual final tag line for soft money electioneering is to 'call' or 'ask' or 'tell' a candidate to stop or continue doing something, often something vague like fighting for the right priorities. This is pretty silly, because it's hard to imagine

thousands of people calling the candidate in response to the ad and saying, keep doing this, this is wonderful. These standard final words, like 'tell,' have become the real 'magic words' in modern campaigning. I imagine some smart lawyer came up with them, because the real audience for them is not the voters, but the courts who may be examining the ad after the election.

Pennington Decl. ¶ 10 [DEV 8-Tab 31]. Both the Chamber of Commerce and AFL- CIO admit that '[t]he ultimate way to tell an elective official to do something is through the voting process.' G. Shea Dep. at 46 [JDT Vol. 30]; Josten Dep. at 230 [JDT Vol. 12] ('I would say that [voting against a candidate] is probably one of the best ways to tell a politician you don't like what they are doing.'). Plaintiffs attempt to challenge this premise by citing text from Senator Feingold's deposition that his constituents do call him about issues they may have seen in issue advertisements; however, a careful reading of the colloquy makes clear that the type of advertisements his constituents may have seen is never clarified. I cannot conclude from this exchange that the advertisements that led to those telephone calls would be covered by Title II of BCRA. During his deposition, Senator Feingold only indicates that he receives calls from constituents in response to television advertisements. Senator Feingold was not specifically asked if these advertisements were the type covered under Title II of BCRA. Feingold Dep at 238-39 [JDT Vol. 6] ('Q. . . . You mentioned ads, and I have shown you ads which say call Senator so and so, contact Senator so and so. Your constituent sometimes do call you and contact you, do they not? A. Yes, they do. Q. And they sometimes talk about issues including abortion, right to life issues and other issues, do they not? A. Yes, they do. Q. In your opinion, are they sometimes affected by advertisements that they have seen on television? A. I'm sure they are.').

Democrat Political Consultant Terry S. Beckett

> I am aware of the idea that particular 'magic words' might be required in order for an advertisement to influence an election. However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete: if you list 50, savvy political actors will find 100 more. For example, many so-called 'issue ads' run by parties and interest groups just before an election attack a candidate, then end by supposedly urging the viewer to 'tell' or 'ask' the candidate to stop being that way. These ads are almost never really about issues. They are almost always election ads, designed to affect the election result, and many do affect the election result. You can see this most clearly in the ones that amount to personal attacks, or that criticize a candidate on several unrelated 'issues.' In fact, in my experience, candidates tend to shy away from such negative attack ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in the 2000 Congressional race, which were financed with federal funds ('hard money'), were actually more about 'issues' than the supposed 'issue ads' run by political parties and interest groups, which I understand were financed at least in part with non-federal funds('soft money').

Beckett Decl. ¶ 8 [DEV 6-Tab 3].

Democrat Political Operative Joe Lamson

> Based on my experience in managing many federal election campaigns, I am familiar with campaign advertising. No particular words of advocacy are needed in order for an advertisement to influence the outcome of an election. When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect. Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive. These 'issue ads' generally stop on the day of the election. For example, these groups could run ads explaining Nancy Keenan's position on the issues after the November general election so that people could discuss them over the Thanksgiving dinner table, but it doesn't seem to work that way.

Lamson Decl. ¶ 6 [DEV 7-Tab 26].

Former Chair of Plaintiff NRA Political Victory Fund Tanya K. Metaksa [83]

> Today, there is erected a legal, regulatory wall between issue advocacy and political advocacy. And the wall is built of the same sturdy material as the emperor's clothing.

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[83] Metaksa served as Chairman of the National Rifle Association Political Victory Fund and as Executive Director of the NRA Institute for Legislative Action. She made the statement above in her opening remarks to the American Association of Political Consultants' Fifth General Session on 'Issue Advocacy.' INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on 'Issue Advocacy,' Jan. 17, 1997, at 2 [DEV 38-Tab 25]. During this litigation, NRA Executive Vice President Wayne LaPierre testified that Ms. Metaksa is 'someone who was knowledgeable about NRA's political strategies' and was someone who was 'a reliable and trustworthy employee of NRA.' LaPierre Dep. at 11 [JDT Vol. 14]. Plaintiffs have not objected to Ms. Metaksa's statement on hearsay grounds and given Mr. LaPierre's comments, I find Ms. Metaksa's statement trustworthy and rely on it for purposes of my Findings.

Everyone sees it. No one believes it. It is foolish to believe there is any practical difference between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.

We engaged in issue advocacy in many locations around the country. Take Bloomington, Indiana, for example. Billboards in that city read,

'Congressman Hostettler is right.'

'Gun laws don't take criminals off Bloomington's streets.'

'Call 334-1111 and thank him for fighting crime by getting tough on criminals.'

Guess what? We really hoped people would vote for the Congressman, not just thank him. And people did. When we're three months away from an election, there's not a dime's worth of difference between 'thanking' elected officials and 'electing' them.

INT 015987, Opening Remarks at the American Ass'n of Political Consultants Fifth General Session on 'Issue Advocacy,' Jan. 17, 1997, at 2 [DEV 38-Tab 25].

2.4.4 As a result of these developments, Congress found that FECA, as construed by the Courts to limit only independent expenditures containing *Buckley*-defined express advocacy, was no longer relevant to modern political advertising. *See, e.g.*, 148 Cong. Rec. S2117 (2002) (Statement of Sen. James Jeffords) ('The 'magic words' standard created by the Supreme Court in 1976 has been made useless by the political realities of modern political advertising. Even in candidate advertisements, what many would say are clearly advertisements made to convince a voter to support a particular candidate, only 10 percent of the advertisements used the 'magic words.''); *see also* 148 Cong.

Rec. S2116 (2002) (Statement of Sen. Carl Levin) ('[T]he Brennan Center study found that of the ads actually run by candidates and paid for with hard money specifically on behalf of their election or defeat, only 9 percent used the seven magic words and phrases identified by the Supreme Court. That is compelling evidence that the magic words identified by the Supreme Court are not a complete test of what constitutes electioneering ads. More is at work here than just the seven magic words identified by the Supreme Court.').

2.5 *Candidate-Centered Issue Advocacy Has Risen Because it Permits Corporations & Labor Unions to Influence Federal Elections with General Treasury Funds While Avoiding FECA's Restrictions*

It is uncontroverted that the shift toward using issue advocacy can be explained by three phenomena. 'First, it permits groups and individuals to avoid disclosure. Second, it allows them to avoid contribution limits. Third, it permits some groups (such as corporations and labor unions) to spend from generally prohibited sources.' Magleby Report at 18 [DEV 4-Tab 8]; *see also* Krasno and Sorauf Expert Report at 50 [DEV 1-Tab 2] (Avoiding FECA allows advertisers to collect any sum ofmoney from any source they can. Avoiding FECA allows advertisers to conduct their operations without disclosing their activities to the public.').

2.5.1 *Avoid Disclosure*

It is not disputed that one advantage to using candidate-centered issue advertising to influence federal elections is that the advertisements are outside FECA's purview. Accordingly, disclosure is not required for the organization paying for these advertisements. Magleby Expert Report at 18 [DEV 4-Tab 8] ('The 1996, 1998 and 2000 election cycles all saw examples of groups who sought to avoid accountability for their communications by pursuing an electioneering

advertising/election advocacy strategy rather than limiting their activities to independent expenditures or other activities expressly permitted by the FECA.'). Indeed, Plaintiffs' expert Sidney M. Milkis notes:

> It is important to point out, however, that interest groups have also increased their political advertisements that connect, indeed subordinate the discussion of issues to electioneering, much of it negative in tone. As an Annenberg Public Policy Center study indicates, the ads of special interest groups represented 68% of all spending on issue ads in the 1999-2000 cycle; interest groups spent more than $347 million on these issue advertisements. The names of these groups did little to tell viewers who the sponsors of these messages were; indeed, in some cases they were misleading. For example, The Citizens for Better Medicare, which spent $65 million on television ads, is funded primarily by the pharmaceutical industry. Not only were the funding sources of interest groups ads more misleading than party-sponsored ads, they also tended to be more negative, especially in the early stages of the 2000 campaign.

Milkis Decl. ¶ 49 [RNC Vol. VII] (citing Annenberg Report 2001). Aside from the observation of Plaintiffs' expert Milkis about the lack of disclosure relating to political advertisements, two further examples illustrate this point:

- In 1998, the AFL-CIO helped pay for ads in the Connecticut Fifth Congressional District race through a group named the 'Coalition to Make Our Voices Heard.' Steven Rosenthal defended campaigning under an obscure name in this case saying, 'Frankly we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.''

Magleby Expert Report at 18-19 [DEV 4-Tab 8] (citing Rosenthal's comments at a lunchtime discussion panel at the Pew Press Conference).

- One or more sources of the funds used by Plaintiff NRA to finance at least one political advertisement that identified a candidate and that was broadcast on television or radio within the 60 days preceding a general election in a state or Congressional district in which that candidate was running for federal office has not been publicly disclosed.

Resps. of the NRA and the NRA Political Victory Fund to Def. FEC's First Req. for Admis., No. 12, 5 [DEV 12-Tab 9] ('The NRA is not required under applicable law to disclose the specific individuals who provide it with funding, and it respects the strong desire of many of its members and contributors to remain anonymous.').

2.5.2 *Avoid Source Limitations*

Federal law has long prohibited corporations and labor unions from using their general treasury funds for federal election purposes. Therefore, another advantage to candidate-centered issue advertising is that the advertisements can be paid for with general treasury funds and thereby avoid FECA's source restrictions. Magleby Expert Report at 19 [DEV 4-Tab 8] ('The ability of corporations and trade unions to effectively campaign through electioneering advertisements and election advocacy' under the rubric of issue advocacy by avoiding the magic words, 'makes a sham of these longstanding federal laws.').

2.5.3 *Avoid Contribution Limitations*

As donations of nonfederal funds are not limited by federal law, 'groups can raise larger amounts of money in less time.' Magleby Expert Report at 19 [DEV 4-Tab 8] (For example, 'groups like Citizens for Better Medicare, Pharmaceutical

Research and Manufacturers of America, NAACP National Voter Fund, and NARAL, were able to far exceed what individuals, PACs or parties could do through hard money contributions.'); *id.* at 10 ('[T]his method of advocacy allows groups to accept unlimited contributions to pay for the communications.'). This fact provides another advantage of using candidate- centered issue advocacy.

2.6 *Organizations' Use of Candidate-Centered Issue Advocacy*

Examples from the record demonstrate that organizations use candidate- centered issue advertising as a means of avoiding FECA's restrictions.

2.6.1 *AFL-CIO's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that the AFL-CIO's issue advertising campaign in and around the 1996 federal general election was designed to influence the election and was paid for with general treasury funds.

2.6.1.1 Denise Mitchell,[84] Special Assistant for Public Affairs to AFL- CIO President John J. Sweeney, states that

[84] Denise Mitchell is the Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney. Mitchell Decl. ¶ 1 [6 PCS]. She was appointed to this position on November 1, 1995, shortly after Sweeney was elected President of the AFL-CIO. *Id.* Prior to assuming this position, Mitchell had worked with Sweeney in a similar role for a number of years when he was President of the Service Employees International Union and she had assisted in his campaign for election to the position of AFL-CIO President. *Id.* Mitchell has worked in marketing and media relations for unions and other non-profit organizations on working family issues for more than 20 years. *Id.* In her current position, Mitchell has the primary responsibility for overseeing all public relations activities of the AFL-CIO including all AFL-CIO use of broadcast and print media. *Id.* ¶ 2. Mitchell is responsible for making the operational decisions as to both the substance and the method of communication of the AFL-CIO's message to union members and to the general public. *Id.* Mitchell makes the

she 'realize[s] that AFL-CIO advertising could affect how citizens vote. . . . [T]hey may in some cases have an indirect effect on election outcomes. . . . This, however, has never been the point of our broadcast advertising program. . . .' Mitchell's statement is controverted by evidence from the record that the AFL-CIO did not attempt to rebut or discount:

- A September 18, 1996, memorandum from a polling firm analyzed the potential impact of five issue advertisements in terms of their likely effect on voters. Memorandum from Guy Molyneux and Molly O'Rourke of the polling firm Peter D. Hart Research Associates, Inc., to the AFL-CIO's Special Assistant for Public Affairs, Denise Mitchell, 'Ad Targeting' (Sept. 18, 1996), AFL-CIO 001614-16 [DEV 124] ('[The advertisement] Taxes appears to be the single strongest spot, in terms of *reaching the widest range of voters and affecting people's impression of the incumbent's Issue position*. It should especially be directed to younger voters. [The advertisement] Kids is also very strong, and again should be directed to young people. [The advertisements] Medicare, Homes, and Retire are most effective with older audiences. If you can only run 4 spots, [the advertisement] Retire is probably the one to drop.') (emphasis added); *see also* Memorandum from Geoff Garin and Guy Molyneux of Peter D. Hart Research Associates, Inc. to Denise Mitchell, 'AFL-CIO Mall Intercepts Survey' (Sept. 13, 1996), AFL-CIO 001582-84 [DEV 124] (Mall Intercept Survey of individuals' reactions to these advertisements including *how the advertisements made the respondents feel about fictitious congressman's position on each issue*); *see also* Mitchell Cross Exam. at 66-75 [JDT Vol. 23].

strategic and logistical decisions regarding the AFL-CIO's media buys, and, within policy guidelines, makes the editorial decisions regarding the content of the AFL-CIO's communications.

- On March 29, 1996, Mitchell received a memorandum from a campaign consultant analyzing political media consultants for the AFL-CIO. The memorandum stated:

  Political campaigns are superheated environments where the objective is not, always, to make the best looking spot. The objective is to communicate with the persuadables at the time they are making their decision. Being able to pivot the entire campaign at exactly the right time is the real talent of a media consulting firm. Consequently, there is little reward for great spots.

  No one knows better than you how consuming this can be. . . .

  [These advertisements can be done], but you must understand that you will be asking these political consultants to do it under rules they have never had to follow before. . . .

  What [all of these firms can do] is manage the political message in a volatile environment.

Memorandum from Joe Cowart of Joseph Cowart Campaign Consulting to Denise Mitchell, 'Political Media Consultants' (Mar. 29, 1996), AFL-CIO 001702-04 [DEV 124].

- An October 9, 1996, internal memorandum from the AFL-CIO's Brian Weeks to AFL-CIO's Mike Klein discussed where media buys might be placed to help Dick Durbin in his Illinois Senate race, based on Mr. Durbin's lack of resources to air advertisements in certain markets. Memorandum from Brian Weeks to Mike Klein, 'Electronic Buy for Illinois Senator' (Oct. 9, 1996), AFL-CIO 005244 [DEV 125].

Accordingly, with regard to the AFL-CIO's issue advertising campaign that aired before the 1996 general election, I find that Mitchell's statement that the indirect effect on election outcomes has never been the point of the AFL- CIO's broadcast advertising program, Mitchell Decl.

¶ 70 [6 PCS], carries no weight in light of these internal documents.

2.6.1.2 It is clear that the AFL-CIO's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate- centered issue advocacy so as to avoid FECA's source limitations. Independent expert testimony, which has not be countered by the AFL-CIO with any contrary expert testimony, demonstrates that the AFL-CIO's 1996 issue advocacy campaign was designed to influence federal elections:

> The 1996 initiative by labor into unregulated and unlimited electioneering communications was substantial. The AFL-CIO spent a reported $35 million dollars (see Deborah Beck, Paul Taylor, Jeffrey Stanger, and Douglas Rivlin, 'Issue Advocacy Advertising During the 1996 Campaign: A Catalog,' report series by the Annenberg Public Policy Center, no. 16, 16 September 1997, 10), much of it on television, aimed at defeating 105 members of Congress, including 32 heavily targeted Republican freshmen. See Paul Herrnson, *Congressional Elections: Campaigning at Home and in Washington,* (Washington, D.C.: Congressional Quarterly, 1998), 123. Labor broadcast television commercials in forty districts, distributed over 11.5 million voter guides in twenty-four districts and ran radio ads in many others. See 'Labor Targets,' *Congressional Quarterly Weekly Report,* 26 October 1996, 3084; Jeanne I. Dugan, 'Washington Ain't Seen Nothin' Yet,' *Business Week Report,* 13 May 1996, 3.

Magleby Expert Report at 10 n.7 [DEV 4-Tab 8] (citation omitted); Mann Expert Report at 28 [DEV 1-Tab 1] ('The AFL-CIO was one of the first nonparty groups in 1996 to seize the opportunity to broadcast electioneering ads under the guise of issue advocacy (Dwyre 1999); they continue to avail themselves of that opportunity today (Magleby 2002).');

Krasno and Sorauf Expert Report at 52 [DEV 1-Tab 2] ('For example, the AFL-CIO in the first issue ad campaign in House elections in 1996 acknowledged its intent to help Democratic candidates, and its results were measured accordingly.') (footnote omitted); *see also* Mitchell Dep. at 96-97 [JDT Vol. 23] (stating that in 1996, in the 60 days before the election, in terms of dollars spent by the AFL-CIO on broadcast advertising, the substantial majority of that money was spent on advertisements that mentioned members of the House of Representatives).

2.6.1.3 In fact, Mitchell admits that some of the AFL-CIO's advertisements were intended to directly orindirectly influence the 1996 general election. Mitchell testifies that after Congress adjourned on October 3, 1996, the AFL- CIO discontinued its broadcast advertisements 'aimed at immediately pending legislative issues.' Mitchell Decl. ¶ 42 [6 PCS]. The AFI -CIO then began to run 'electronic voter guides' which compared the positions of congressional candidates on various issues. *Id.;* Mitchell Cross Exam. at 183-84 [JDT Vol. 23] ('Is there any ad which the AFL-CIO ran in the 60-day period prior to the federal elections of 2000, 1998 and 1996 where you concede that a purpose was to affect the vote in the forthcoming election? . . . A Well, would you include indirectly affect? Do you want to ask it that way? Q I will start with that way. A Okay. You know, certainly the voter guides in particular had that as a purpose.'); *see also id.* at 184 ('Q You do concede that the ads that you ran in the 60 days prior to 2000, 1998 and '96 might have had the effect of influencing votes in the forthcoming election, don't you? A I don't—right, I don't deny that among other things they might have had an effect on how citizens perceived office holders and had an effect on their vote.').

2.6.1.4 In an FEC investigation into organized labor's role in the 1996 election, the General Counsel found:

> In the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements. The targets of these advertisements were uniformly both Republicans and incumbents. In the eight flights that began in late September and continued through election day, the advertisements took the form of so-called 'electronic voter guides,' comparing the Republican incumbent and the Democratic challenger (or the Republican and Democratic nominees, in the cases of open seats) on a particular issue; the Democratic candidate's record was uniformly presented more favorably than the Republican candidate's. The scripts of both kinds of advertisements appeared to have been carefully designed to avoid 'express advocacy' of the election or defeat of any candidate. . . .

FEC MUR 4291, General Counsel's Report, June 9, 2000, at 5-6, INT003837-38 (footnote omitted) [DEV 52-Tab 3]. The investigation into the AFL-CIO's tactics sought to ascertain whether AFL-CIO had coordinated election-related communications with candidates for Federal office, their campaigns, or with political parties. *Id.* at 1. The investigation 'developed no evidence of any instance in which the AFL-CIO made any communication to the general public after coordination with a recipient candidate or party committee

that meets the standard for coordination set forth in *FEC v. The Christian Coalition,* 52 F. Supp. 2d 45 (D.D.C. 1999).' *Id.* at 3. As a result of this conclusion, the General Counsel recommended to the Commission that the investigation into organized labor's role in the 1996 elections be closed. *Id.* at 1. Although the FEC concluded that there was no coordination under governing caselaw, the agency did find that with one exception the issue advertisements were directed at particular officeholders and candidates during the election cycle.

2.6.1.5 Other political organizations viewed the AFL-CIO's issue advertising campaign as designedto influence federal elections. One of the complaints filed with the FEC against the AFL-CIO was brought by the National Republican Congressional Committee ('NRCC'). McCain Decl., Attach. F [DEV 8-Tab 29] (Complaint in MUR 4307). The NRCC stated in their complaint:

> The [AFL-CIO] TV ads are careful not to specifically violate phrases contained in Sec. 100.22(a) such as 'vote against Old Hickory' or 'defeat accompanied by a picture of one or more candidate/s/' or 'reject the incumbent'. However there is clearly a violation of Sec. 100.22(b). *If one reads the language of that section and looks at the entire picture including external events it is obvious that any informed American clearly knows that the purpose of these ads is 'expressly advocating' defeat of the Republican who is the subject of the ad.*

Id. at 1 (emphasis added).

2.6.1.6 The AFL-CIO has presented no uncontroverted evidence to substantiate their claim that the intended purpose of their issue advocacy with regard to the 1996 general election was unrelated to electing or defeating candidates for federal office. The AFL-CIO does concede, in fact, that its issue advocacy does have an affect on voters during the election cycle. Moreover, there is no dispute that the AFL-

CIO's advertising campaign did affect the 1996 general election. Of the 32 House Republican freshmen the AFL-CIO targeted in 1996, 12 were defeated. Annenberg Report 1997 at 13 [DEV 38-Tab 21].

2.6.2 *The Coalition-Americans Working for Real Change's Issue Advocacy Media Campaign Surrounding the 1996 Federal Election*

The evidence demonstrates that similar to the AFL-CIO's issue advertising campaign during the 1996 election cycle, business interests (known as The Coalition-Americans Working for Real Change) responded with their own issue advocacy campaign designed to influence the election and paid for with corporate general treasury funds thereby permitting these corporations to evade FECA's source limitations. The record also demonstrates that by running candidate-centered issue advertisements The Coalition was able to avoid FECA's disclosure requirements and hide its corporate sponsors behind an ambiguous and unobjectionable pseudonym.

2.6.2.1 In their proposed findings, the Chamber of Commerce, NAM, and the Associated Builders and Contractors claim that 'Defendants' assertion that The Coalition's 1996 activities show that preelection issue ads are merely candidate ads in disguise is mistaken. Participants in The Coalition were unanimous that its ads were intended to respond to issue ads being run by the AFL-CIO.' Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al.* ¶ 24. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce, testifies that the purpose of the advertisements aired during the 1996 federal election was to respond to attack advertisements paid for by the AFL-CIO and organized by its president, Mr. John Sweeney, and not to influence the election of any federal candidate. Josten Dep. at 165 [JDT Vol. 12] ('The purpose of this coalition, specifically, only,

uniquely was to respond to [John Sweeney's] ads and the false statements in them, in some cases, up to 75 Congressional districts. That was the mission of this coalition.'). Mr. Josten explained that there 'were TV markets where John Sweeney ran an ad accusing a member of Congress about their votes on the issues that I mentioned earlier, and in the spring he started running ads that were not true, and we would follow him' with television ads paid for by the Coalition. *Id.* at 44. According to Mr. Josten, the AFL-CIO commercials attacked Members of Congress who had supported pro-business initiatives and legislation favored by the Coalition. 'My objective was to knock down impressions that Mr. Sweeney and his advertisers and campaigns were trying to undertake and express our viewpoints exactly the opposite of that and let the viewers make their own decision about that dialogue that was being imposed on them.' *Id.* at 88.

2.6.2.2 Josten's testimony is controverted by specific evidence in the record that indicates that one purpose of the advertising campaign was to influence the 1996 general election:

- In 1996, the Coalition sought proposals from advertising firms for a 'campaign to re-elect a pro-business Congress.' TC00698 [DEV 121]. Media consultant Alex Castellanos of National Media, Inc. opened his proposal to the Coalition by stating: 'Thank you for the opportunity to present two 30 second television and one 60 second radio scripts, as requested, to your campaign to re-elect a pro-business Congress.' *Id.*

- The Coalition commissioned firms to conduct polls and focus groups to measure voter responses to their advertisements. AV0024-40, 0046-47, 0060-64, 0106-118, 0139-41 [DEV 121]. The Coalition retained two polling organizations in 1996, the Tarrance Group and American Viewpoint, to test whether specific Coalition

and AFL-CIO advertisements would make participants more or less likely to vote for particular federal candidates. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at 22-23 [DEV 53-Tab 6]; Josten Dep. at 68- 114 [JDT Vol. 12]. One firm surveyed 'voter attitudes nationwide,' TC 00513-37 [DEV 121], and another survey tested possible Coalition ads on focus groups, including one of 'Swing Voters.' AV0139-41, AV0037-40 [DEV 121].

- A June 28, 1996, Tarrance Group memorandum to the Coalition stated: 'The net result among swing voters in Cleveland was that 25% of participants were moved closer to voting for a Republican candidate for Congress and about half of the participants were moved against national labor leaders. In other words, the response ads not only leveled the playing field, but put some points on the board for Republican candidates as well.' AV139 [DEV 121] (stating that Republican Members of Congress are 'currently under attack by AFL-CIO advertising' and are 'outgunned and outclassed' and if 'targeted Republicans ever hope to be operating on an even playing field during the 1996 election, it will require that an outside voice come to their defense.').

- A July 12, 1996, memorandum to the Coalition from American Viewpoint on 'Key Findings of the Pre-Test in Des Moines Media Market of Iowa 4' concludes that Congressman 'Greg Ganske is in deep trouble in the Des Moines Market,' and states that 'this is one of the most challenging districts that could have been chosen to assess the impact of your advertising. . . . If advertising can move numbers in this district, it should be effective in most other districts. Voters have not yet focused on the union's campaign as only 25% has seen the commercials. As a result, there is still time to reach them with a substantial buy.' Memorandum from Gary

Ferguson to the Coalition Steering Committee, 'Key Findings of the Pre-Test in the Des Moines Market of Iowa 4' (July 12, 1996), NAW0002, 05 [DEV 121].

- One Coalition document included five headings referring to 1996 Congressional races: 'Lean/Tilt DEM,' 'Toss-Up/Tilt GOP,' 'Lean GOP,' 'GOP Favored,' and 'Watch List.' TC-00662-63 [DEV 121]. Under each heading is a list of candidates, and next to the names an indication of whether there has been a single or double media buy, or whether the buy has been pulled. *Id.*

- In late 1996, the Coalition commissioned the Tarrance Group to conduct a detailed post-election analysis. The Tarrance Group, *Coalition Post-Election Survey Analysis*, NAM0206-27, at NAM0213 [DEV 121]. The Tarrance Group reported:

  > The Coalition commissioned this research to assess the impact of their two-month advertising campaign and its relative effect on voters in the face of the very aggressive, year-long campaign sponsored by the AFL-CIO. Given that four of the six Republican candidates tested in this research won their respective races, one could conclude that the Coalition's efforts were a success-as they were in the vast majority of the targeted districts in which the Coalition was involved.
  >
  > To be sure, the most compelling empirical evidence that Coalition dollars were spent effectively is the fact that although the AFL-CIO outspent the Coalition by nearly 7 to 1 and began their onslaught almost a year earlier, voters in the tested districts were only twice as likely (36% average) to recall having seen, read, or heard the labor union's advertising as they were the business coalition's advertising (16% average).

Memorandum from Brian Tringali and Gary Ferguson of American Viewpoint and the Tarrance Group to Chuck Greener of the Coalition, 'Key Findings from Post- Election Surveys in OH-6, IA-4, WA-1, WA-5, WA-9, and KY-1,' (November 22, 1996), NAM0208 [DEV 121]; *see also* 'Report on Accomplishments' TC00610-13 [DEV 121] (document Coalition sent to its members noting the successes of the Coalition's campaign among swing voters).

Accordingly, as to The Coalition's issue advertising campaign that aired before the 1996 general election, I find that Josten's statement that the purpose of the coalition was 'only' to respond to the advertising campaign of the AFL-CIO, Josten Dep. at 165 [JDT Vol. 12], carries no weight in light of these internal documents.

2.6.2.3 It is clear that The Coalition's issue advocacy campaign was designed to influence the 1996 general election and was accomplished through candidate- centered issue advocacy so as to avoid FECA's source and disclosure limitations. Independent evidence confirms that The Coalition's issue advertising campaign surrounding the 1996 general election was designed to influence the election. This expert testimony, which has not been controverted by any contrary expert testimony by Plaintiffs, concludes that:

> The business community responded to [the 1996 initiative by labor into unregulated and unlimited electioneering communications] with their own unlimited and undisclosed communications, again avoiding any of the magic words. Partners in the business response were the National Federation of Independent Business (NFIB), U.S. Chamber of Commerce, the National Association of Wholesaler-Distributors, the National Restaurant Association and the National Association of Manufacturers. Their group, called the 'Coalition-Americans Working for Real Change,' was active in thirty-seven House races, spent an estimated $5 million on over thirteen thousand television and radio commercials, and mailed over two

million letters mainly in support of Republicans, to owners of small business. *See* Paul Herrnson, 'Parties and Interest Groups in Postreform Congressional Elections,' in *Interest Group Politics,* 5th ed., ed. Allan Cigler and Burdett A. Loomis (Washington, D.C.: Congressional Quarterly, 1998), 160-61.

Magleby Report at 10 n.7 [DEV 4-Tab 8]; *see also* Josten Dep. at 29 [JDT Vol. 12]; Huard Dep. at 58 [JDT Vol. 11] (both noting that Coalition spent roughly $5 million on the campaign).

2.6.2.4 The FEC likewise concluded that the purpose of the Coalition's 1996 issue advocacy campaign was to influence the federal election. FEC MUR No. 4624, General Counsel's Report, April 20, 2001, at FEC MUR 4624, General Counsel's Rep., April 20, 2001, at 35 [DEV 53-Tab 6] ('The factsset out above establish that the Coalition's communications were undertaken for the purpose of influencing federal elections . . . .'); *id.* at 44-45 (recommending that the case against the Coalition be closed). Like the AFL-CIO, although the FEC recommended that the case be closed, that decision does not change the fact that it found that the Coalition sought to influence the 1996 general election with its issue advertising campaign.

2.6.3 *Citizens for Better Medicare*

Citizens for Better Medicare ('CBM') is an organization funded by the pharmaceutical industry that spent heavily on candidate-centered issue advertisements designed to influence the 2000 general election and paid for with the general treasury funds of their corporate members, thereby avoiding the source limitations of FECA. Like The Coalition, CBM also used issue advocacy to avoid FECA's disclosure requirements.

2.6.3.1 Timothy Ryan, former executive director of CBM, testifies that CBM is an organization sponsored by PhRMA,

an industry trade association, and its activities were primarily financed by major drug companies. Ryan Dep. at 13 [JDT Vol. 27] ('We solicited funding from the pharmaceutical companies to underwrite our efforts.'); *id.* at 10-11 ('PHRMA was really the leading organization to organize and fund CBM.'); PH 0379 [DEV 128-Tab 2] (Letter from PhRMA President and CEO to Amgen, 'enclosing a contribution form for the grassroots and local media activities of CBM . . . . All information in your reply will be kept in strict confidence except as required by law or a court of competent jurisdiction.'); CBM 0029 [DEV 128-Tab 1] (tally of donations from major drug companies to CBM in FY 2001, totaling $39,586,892.32). Despite the source of its funding, CBM describes itself as 'a grassroots organization representing the interests of patients, seniors, disabled Americans, small businesses, pharmaceutical research companies and many others concerned with Medicare reform.' *CBM: Who We Are* . . . [DEV 128-Tab 1]. Given that it is undisputed that the pharmaceutical industry financed CBM, CBM stands as an example of how FECA's disclosure requirements can be avoided by running candidate-centered issue advertisements behind a misleading name like 'Citizens for Better Medicare.'

2.6.3.2 At the point in time the House of Representatives was considering a prescription drug benefit bill, Ryan testifies that CBM ran a series of advertisements that did not refer specifically to individual Members of Congress. Ryan Dep. at 42 [JDT Vol. 27]; *see also* Castellanos Dep. at 103-04 [JDT Vol. 4]. This practice changed during the 60 days before the election where CBM's advertising focused on specific federal candidates. *See supra* Findings ¶ 2.6.3.3.

2.6.3.3 Judith Bello, senior adviser to PhRMA, states that PhRMA supported a market-oriented approach to prescription drug coverage, and Republicans typically endorsed that type of plan. Bello Dep. at 149-50 [JDT Vol. 1]. Alex Castellanos, a political consultant with National Media, testifies that CBM

understood that the Democrats planned to use the prescription drug issue as a major theme in the 2000 election. Castellanos Dep. at 94-95. In response, in the *60 days* prior to the 2000 general election, CBM and the U.S. Chamber of Commerce spent heavily on 'issue ads' supporting those Members and attacking Democratic candidates. Annenberg Report 2001 at 4, 20-22 [DEV 38-Tab 22]. Castellanos states that these advertisements mentioned Members' names. Castellanos Dep. at 63-66 [JDT Vol. 4]; *see also* Ryan Dep. at 68-72, 79-85 [JDT Vol. 27]; Josten Dep. at 191-97 [JDT Vol. 12]; Bloom Decl. ¶¶ 6, 14, 16 [DEV 6- Tab 7]; Mitchell Dep. at 198-204 [JDT Vol. 23]; USA-CBM 00004 [DEV 128-Tab 1] (October 20, 2000, Memorandum to CBM file outlining 'CBM Campaign Summary') (noting that for Fall2000 the advertising theme was 'Keep it Local' and discussing advertising strategy '[a]s the November 2000 elections grew closer').

2.6.3.4 According to Timothy Ryan, much of CBM's advertising strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising. Ryan Dep. at 68-72 [JDT Vol. 27]; Castellanos Dep. at 63-66 [JDT Vol. 4]. CBM spent about $65 million on television advertising in the 2000 election cycle. Ryan Dep at 15 [JDT Vol. 27]. 'Citizens for Better Medicare . . . spent almost as much money on issue ads as either political party,' accounting for 13 percent of issue ad spending for the 1999-2000 cycle. La Raja Decl. ¶ 20(b) & Tbl. 10 [RNC Vol. VII] (reproduced from the Annenberg Public Policy Center).

2.6.3.5 The issue advocacy campaign of CBM run in the 60 days prior to the 2000 federal election demonstrates that these advertisements were designed to influence the federal election and evade FECA's source restrictions. This example also illustrates how organizations are able to use campaign-centered issue advocacy to avoid FECA's disclosure limitations and hide their identities behind euphemistic organizational names.

2.6.4 *The National Rifle Association*

In addition to the AFL-CIO, The Coalition, and CBM, the National Rifle Association's ('NRA') use of issue advocacy around the 2000 federal election also clearly establishes that corporations use issue advocacy to directly influence federal elections and evade FECA's source limitations.

2.6.4.1 The NRA used issue advocacy to influence the 2000 federal election. Documentary evidence demonstrates this point:

- The NRA's media consultant, Angus McQueen, wrote an August 2000 memo entitled 'NRA National Election Media Recommendations.' The memo notes that the NRA's first objective is to 'influence [the] outcome of [the] presidential election and other key congressional seats in 10 'battle ground' states.' McQueen Cross Exam., Ex. 2, NRA-ACK 17913-15 [JDT Vol. 22]. McQueen is an advertising professional whom the NRA produced to testify specifically about the NRA's paid media program. *See generally* McQueen Decl. [11 PCS].

- Executive Vice President of the NRA, Wayne LaPierre, sent out a fundraising letter from the NRA to its members that stated that he 'spent what it took [in 2000] to defeat A1 Gore, which amounted to millions more than we had on hand.' LaPierre Dep. Ex. 3 at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]. LaPierre testified: 'We took some money out of the reserves to cover the deficit that NRA had at the end of the 2000 year. . . . [The Gore advertising] was probably . . . the main contributing factor.' LaPierre Dep. at 105 [JDT Vol. 14].

- The fundraising letter from LaPierre also stated that 'I could choose to spend as much as the NRA possibly could, to get our message to gun-owning voters in critical swing states—or I could hold funds in reserve for battles during 2001 and beyond.' LaPierre Dep. Ex. 3

at 3 (NRA02575 [DEV 120]) [JDT Vol. 14]; *see also* LaPierre Dep. at 95-106 [JDT Vol. 14] (observing that the NRA spent $5 million to defeat A1 Gore). During his deposition, Mr. LaPierre was asked repeatedly if he had 'spent what it took to defeat A1 Gore.' *Id.* at 95-102. Mr. LaPierre admitted that the statement was truthful, *id.* at 102, but sought to characterize it as about more than the Presidential election, *id.* at 101-02 ('Q. Is it true that regular NRA 'spent what it took to defeat A1 Gore'? A. If you include the culture of the country, yes. A1 Gore was trying to change the culture of the country. We prevented him from doing it. That was the battle. It wasn't only an election battle. All these politicians think of this stuff only in election terms. And it's like-it's like they're 30 years out of date. The fact is this is about the air. It's about the airwaves. It's about the hearts and minds of America. And that's where the battle is being fought. And they're not willing to concede that. Yet we live it every day. So I'm not willing to concede the point that this was only about the elections, because the elections were about the air. And the air is what we were fighting for, that people breathe. We didn't want it to be only anti-firearm second amendment air, which is what they were trying to put out there.').

- LaPierre also testifies that he chose to do as much as he could for critical swing voters in swing states, meaning battleground states with respect to the Presidency, and in what were perceived to be close Congressional races. LaPierre Dep. at 157-58 [JDT Vol. 14]; *see also id.* at 159-165, 220-21.

2.6.4.2 The NRA created an advertising campaign in which 'infomercials' would be run from September 1, 2000 to November 6, 2000. Two of the NRA's objectives were to 'influence political elections where Republican seats are jeopardized' and 'increase awareness of key gun issues as the

Presidential election approaches.' Memorandum from Jay Finks of the NRA's media firm Ackerman-McQueen to Melanie Hill of the NRA, 'NRA Infomercial Fall Focus Campaign,' June 5,2000, NRA-PVF 00429-00432, at NRA-PVF 00429 [DEV 120].

2.6.4.3 Wayne LaPierre also testifies that the NRA 'hoped [an NRA infomercial critical of Presidential candidate A1 Gore] would impact the election.' LaPierre Dep. at 177 [JDT Vol. 14]. When asked if the advertisement was designed in part to persuade viewers that they ought to vote against Gore, LaPierre testified: 'We're happy if it did that. And, yeah, we're thrilled if it did that.' *Id.* at 174-75. LaPierre thought that the Gore infomercials would have a 'positive' political impact on the election: 'Positive impact would mean a vote . . . against A1 Gore.' *Id.* at 277.

2.6.4.4 Not only does internal documentation and testimony from NRA officials demonstrate that the purpose of the group's 2000 issue advocacy campaign was to influence the federal election, the text of two radio advertisements illustrates the point as well. Moreover, these radio advertisements demonstrate that there is no meaningful difference between candidate-centered issue advertisements and campaign advertisements that use *Buckley*'s magic words. As the following demonstrates, at least one of the 'issue ads' paid for with funds from the NRA's general treasury was virtually identical to express advocacy paid for by the NRA's PAC, with the terms of express advocacy in the PAC advertisement simply being omitted:

PAC Advertisement	Non-PAC Advertisement
MR. HESTON:	HESTON: Other issues may come and go, but no issue is as important as our freedom. And the day of reconing is at hand.

Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to any firearm? No handgun, no rifle, no shotgun.	Did you know that right now in federal court, Al Gore's Justice Department is arguing that the Second Amendment gives you no right to any firearm? No handgun, no rifle, no shotgun.
And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges handpicked by Al Gore if he wins this election.	And when Al Gore's top government lawyers make it to the U.S. Supreme Court to argue their point, they can have three new judges hand-picked by Al Gore if he wins this election.
Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?	Imagine . . . what would Supreme Court Justices Hillary Clinton, Charlie Schumer, and Dianne Feinstein do to your gun rights?
And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.	And what you think wouldn't matter any more. Because the Supreme Court has the final say on what the Constitution means.
When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of fire-arms, that's the end of your Second Amendment rights.	When Al Gore's Supreme Court agrees with Al Gore's Justice Department and bans private ownership of fire-arms, that's the end of your Second Amendment rights.
Please, vote freedom first. Vote George W. Bush for President.	
ANNCR: Paid for by the NRA Political Victory Fund and not authorized by any candidate or candidate's committee.	ANNCR: Paid for by the National Rifle Association.
NRA-ACK 14190 [DEV 120] (emphasis in original).	NRA-ACK 14192 [DEV 120] (emphasis in original).

NRA-ACK 14190, 14192 [DEV 120]. When confronted with these two scripts during his cross-examination, Angus McQueen, who created these two advertisements, admitted that one of his purposes in designing the commercials was to influence the results of the federal election. McQueen Cross Exam. at 41 [JDT Vol. 22] ('Insofar as providing information to an informed citizenry, the answer is a qualified yes.'). Indeed, Mr. Wayne LaPierre testifies that these two scripts were 'exactly the same.' LaPierre Dep. at 269 [JDT Vol. 14]; *id.* at 270-71 (observing that in the Non-PAC advertisement, Mr. Heston's reference to the 'day of reckoning' is a reference to the 2000 federal election). These two advertisements are emblematic of the meaningless distinction between candidate- centered issue advocacy run in close proximity to a federal election and advertisements that use express words of advocacy and are paid for with federal funds from a corporate or union PAC. Accordingly, I find that the NRA's issue advocacy campaign paid for with general treasury funds and run during the 2000 election was designed to influence that election and evade FECA's restrictions.

2.6.5 *The Club for Growth*

2.6.5.1 The Club for Growth provides another example of a corporation using general treasury funds on issue advocacy designed to influence a federal election. *See* CFG 000421 [DEV 130-Tab 5] (Board of Directors' minutes) [document sealed].

2.6.5.2 David Keating, The Club for Growth's Executive Director admits that CFG's issue advocacy, 'although educational, may also affect elections.' Keating Decl. ¶ 8 [8 PCSJ. Keating comments that 'CFG has an overarching desire to change public policy which far exceeds any desire to affect elections.' *Id.* It is clear from documentary evidence and independent evidence that The Club for Growth aims to change public policy by influencing federal elections.

2.6.5.3 The Club for Growth's mission statement states that the Club 'is primarily dedicated to promoting the election of pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns.' CFG 000217 [DEV 130-Tab 5].

2.6.5.4 In a brochure soliciting donations, The Club for Growth noted: 'Before the elections, the Club plans to invest $1 million in television advertising in key congressional districts to advance our pro-growth issues. This is a tactic the unions have used so effectively against pro-growth candidates. These issue advocacy campaigns can make all the difference in tight races.' CFG 000223 [DEV 130-Tab 5]; *cf.* NRW-02814 [DEV 129-Tab 2] (January 2, 2001, fundraising letter from the National Right to Work Committee noting that it had run 'more than 1,000 television ads in Virginia, Nevada, Florida and Nebraska shining a spotlight on the differences between the candidates in those states on Right to Work').

2.6.5.5 The testimony of political consultant Rocky Pennington, who worked for Republican candidate Bill Sublette is that:

> [i]nterest group broadcast ads had a very significant effect on the outcome of the 2000 Congressional race [in Florida's Eighth district], especially the ads run by the Club for Growth. . . . [T]he Club for Growth and [competing Republican candidate Ric] Keller had made their relationship well known, and the Club for Growth ads clearly reflect an intent to help elect Mr. Keller. . . . In my view, the ad entitled 'Keller Sublette Higher Taxes' . . . was a very, very effective one, and had it not run just before the primary, I believe Mr. Sublette would have reached 50% and there would have been no run-off.

> Our polling at that time indicated that we were in good shape, until the Club for Growth ads began.

Pennington Decl. ¶ 15 and Ex. 3-1 [DEV 8-Tab 31]; *see also* Keating Decl. ¶ 17 ('Within thirty days of the 2000 primary election in Florida, [The Club for Growth] ran approximately $90,000 in television and radio voter education advertising discussing the tax voting record of Bill Sublette.').

2.6.5.6 Independent expert testimony confirms that The Club for Growth uses issue advocacy to influence federal elections. Krasno and Sorauf Report at 52 [DEV 1-Tab 2] ('The Club for Growth, a conservative Republican group, bluntly discusses its electioneering activities on its website; they include direct contributions, bundled contributions, and issue ads.').

2.6.5.7 Without question, The Club for Growth aggressively used issue advocacy to influence the 2000 federal elections. The Club for Growth paid for these advertisements with corporate general treasury funds and thereby evaded FECA's restrictions.

2.6.6 *Candidate-Centered Issue Advertisements May Be Run About Issues In Which the Group Running Them Has No Particular Interest*

Aside from the foregoing examples, another indicia that an issue advertisement has an electioneering purpose is that, in certain instances, candidate-centered issue advertisements are run by organizations who have no organizational interest in the advertisement's 'issue.'

2.6.6.1 Federal candidate Linda Chapin testifies that

> [t]he Florida Women's Vote project of EMILY's List also ran a television ad in the [2000 Florida Eighth District Congressional] campaign[,] . . . which as I recall was run in the two months prior to the general election[.] The ad praises my record on gun safety and ends with

> the line: 'Tell Linda Chapin to continue fighting.' This ad is clearly intended to influence the election result. Based on my observations, EMILY's List is not particularly interested in gun control issues. However, they are interested in supporting pro-choice female candidates like me, and this ad serves that purpose.

Chapin Decl. ¶ 13 [DEV 6-Tab 12]; *id.*, Ex. 4 (advertisement storyboard); *see also* Chapin Dep. at 35-36 [JDT Vol. 5] ('Q. Did the ads [run by EMILY's List] mention your commitment to being pro-choice? A. No, and I think that's one thing that was interesting about these ads was that they were not about choice; they were about other subjects.'); Beckett Decl. ¶ 13 [DEV 6-Tab 3] (The advertisement run by EMILY's List 'praises Ms. Chapin's record on gun safety . . . . EMILY's List is all about being pro-choice; gun safety is not their issue. Clearly, this ad is trying to elect Ms. Chapin. And I was not the only one who thought so. This ad was up during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. The [Republican candidate Ric] Keller['s] campaign noticed this and complained to a reporter, saying that this was a clear sign of coordination. I explained . . . that I had been advised by our consultants in Washington that under the current rules I was allowed to tell anyone what my plans were, as long as no one told me what their plans were. EMILY's List clearly knew what my plans were, they knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information. Obviously, the Keller campaign viewed this ad as one designed to assist Ms. Chapin's candidacy.'); *id.* Ex. 4 (advertisement storyboard).

2.6.6.2 The Associated Builders and Contractors' Edward Monroe, in testifying about an ABC issue advertisement that discussed federal candidate Melissa Hart's past actions of pushing for the 'strongest possible penalties for child

molesters who attempt to lure children over the internet,' admitted that pushing for such penalties was not a particular concern of ABC members as compared to the general public. Monroe Dep. at 65-67, 90-91 [JDT Vol. 23]. Indeed, Monroe testifies, '[a]s previously answered, no, [the pushing for strongest possible penalties for child molesters who attempt to lure children over the Internet] is not a particular concern to the general public of contractors or general group of contractors.' *Id.* at 91. ABC attempts to explain this away in their proposed findings of fact by citing Monroe's redirect examination where Plaintiffs attempted to rehabilitate his testimony. Proposed Findings of Fact of Chamber, NAM, Associated Builders and Contractors, *et. al.* ¶ 26 ('ABC's membership has a distinctive ethos: 'very strong patriotic red, white and blue God and country association,' so that issues like children and pornography are important and pushed by state affiliates.') (citing Monroe Cross at 100-01). On re-cross examination, Defense counsel confirmed the following:

> Q Would you turn to page 66 of your deposition. I will read to you starting with line 20. Do you see that? A Yes. Q Question, 'Do your contractor and builders members have any different or special interest in child molestation as compared to the general public?' Answer, 'No.' Did you give that testimony and was it truthful? A Yes.

Monroe Cross Exam. at 102 [JDT Vol. 23]. Accordingly, I find that Plaintiff ABC has not cast any doubt on the conclusion that ABC ran candidate-centered issue advertisements about issues that were not of greater concern to its membership than to the general public. This conclusion leads me to find that the ABC advertisements relating to Melissa Hart's views on punishment for child molesters were designed to influence the election.

2.6.6.3 David Keating, executive director of The Club for Growth, testifies that during the 2000 election cycle, The

Club for Growth gave $20,000 to the American Conservative Union to support an issue advertisement which discussed Senate candidate Hillary Clinton's residency in New York. Keating Dep. at 58- 59 [JDT Vol. 12] ('Q. Whether or not Hillary Clinton is a resident of New York State really doesn't have anything to do with the Club for Growth's interest in pro-growth conservative Republican elected officials, does it? A. It doesn't seem to directly, no.').

2.6.6.4 The testimony of Defense expert Magleby notes the following example of an advocacy organization running an issue advertisement not connected to its mission:

> An example of an interest group which not only masked its identity through an innocuous name, but ran ads on a topic unrelated to the function or purpose of the group was The Foundation for Responsible Government (FRG). In 1998 FRG spent nearly $300,000. Who was 'The Foundation for Responsible Government?' The trucking industry. Upon investigation, Professor Eric Hrzik of the University of Nevada-Reno found that the trucking industry was upset with Senator Reid for supporting legislation that would have banned triple trailer trucks. Rather than discuss their policy difference with Reid on triple-trailer trucks, FRG ran mostly positive ads late in the campaign, discussing Reid's opponent, John Ensign's positions on health care and taxes.

Magleby Report at 28-29 [DEV 4-Tab 8] (footnotes omitted).

2.6.6.5 A Citizens for Life press release, issued on January 9, 2000, about three weeks before the New Hampshire Republican Presidential primary, announced that the organization had begun airing an advertisement entitled 'Funny Diseases' on several New Hampshire radio stations with the following script:

> Four million Americans suffer from Alzheimer's disease—a brain disorder that causes progressive mental impairment. According to a September 1, 1999 Associated Press report, here is what Senator John McCain once had to say about the devastating memory loss produced by this disease: 'The nice thing about Alzheimer's is you get to hide your own Easter eggs.' . . . McCain also once jokingly referred to the Leisure World home for senior citizens as 'Seizure World.' This information is brought to you by Citizens For Life, a New Hampshire pro-life organization.

NRLC-00017 [DEV 130-Tab 1]; *see also* NRLC-00016 (Press Release) (claiming that the advertisement is timely because the New Hampshire State Senate will be voting in January on a bill to legalize assisted suicide). I find that this advertisement was designed to influence the primary election.

2.6.6.6 These examples indicate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections and thereby avoid FECA's requirements.

2.6.7 *Candidate-Centered Issue Advertisements May Be Run About Past Votes Without Discussing Upcoming Legislation or May Be Run About Issues Not Pending Before the Legislature*

The record indicates that organizations often run candidate-centered issue advertisements about Members' past votes on bills without discussing any future legislation or run advertisements about a Member's position on an issue that is not pending before Congress at the time the advertisement is aired. These kinds of advertisements are another indication of organizations running candidate-centered issue advertisements, paid for with general treasury funds, that are designed to influence a federal election.

2.6.7.1 A series of advertisements run by the AFL-CIO illustrates the point that issue advertisements designed to influence federal elections can focus on a past vote of a

particular member and not on encouraging a Member to vote in a particular way on pending or future issues or legislation. Issue advertisements that fall into this category provide strong indicia that these purpose of these commercials is to influence the outcome of a federal election because they only provide analysis of the Member's past vote. *See, e.g.*, Mitchell Decl. ¶ 61 [6 PCS] (AFL-CIO advertisement 'Job,' which ran between September 13 and 25, 2000, criticized candidates for already having voted 'to prevent an importantOSHA regulation intended to prevent repetitive motion injuries from being implemented') Ex. 1 at 101-02, 141-42 ('Yet Congressman_____ voted to block federal safety standards that would help protect workers from this risk.') [6 PCS]; *id.* ¶ 58 (AFL-CIO advertisement 'Help' targeted 'Republican Representatives who had voted against the Patient's Bill of Rights when it passed the House in October, 1999'), Ex. 138 ('Yet Melissa Hart has sided with the insurance companies, opposing the real Patients' Bill of Rights.'); *id.* ¶ 59 (AFL-CIO advertisements 'Sky' and 'Protect,' run in July and August of 2000, criticized 'twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare'), Ex. 139 ('Sky') ('Yet Congressman Kuykendall voted *against* guaranteeing seniors prescription benefits under Medicare. . . .) (emphasis in original), Ex. 140 ('Protect')[85] ('Yet Congressman Jay

[85] The full text of 'Protect' is: PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.

VOICE: Yet Gongressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices. Tell Dickey quit putting special interests ahead of working families.

Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runway [sic] prices.').

2.6.7.2 Another example of candidate-centered issue advertisements designed to influence federal elections is Plaintiff U.S. Chamber of Commerce's advertisements run during the 2000 federal election attacking various Members on the prescription drug issue that was not pending before Congress at the time the advertisement was aired. *See* Josten Dep. 191-230 & Exs. 23-23I [JDT Vol. 12]. Most of these advertisements concluded by instructing viewers to tell the targeted Members to 'stop supporting a big government prescription drug plan.' *Id.* Exs. 23-23I. However, these same advertisements included no telephone number to call, *see id.* at 194, and by the time the advertisements aired, there was no prescription drug issue then pending before Congress, *id.* at 208-11. Indeed, a few of these advertisements were run against candidates who were not even incumbents. Josten Dep. at 197, 212, 227 & Exs. 23A, 23D, 23E, 23I [JDT Vol. 12]. Hence, the point of these advertisements was likely *not* to influence any pending issue before the Congress, because the candidate mentioned was not even a Member of Congress.

2.6.7.3 These examples demonstrate that organizations run advertisements about past votes or about issues no longer before Congress. The purpose of these types of candidate-centered issue advertisements is to influence a federal election with general treasury funds and to avoid FECA's restrictions.

PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Mitchell Decl. Ex. 140 [6 PCS].

2.6.8 *Candidate-Centered Issue Advertisements Often Permit the Candidate to Avoid Running 'Negative' Advertising or Otherwise Assist the Candidate by Running Advertising While the Candidate is Low on Funds*

Two other indicia that candidate-centered issue advocacy is designed to influence a federal election and thereby avoid FECA's restrictions over organizations (a) helping a candidate by running negative advertisements[86] so as to permit the candidate to run positive advertisements and (b) helping a candidate by running advertisements where and when the candidate cannot due to budget constraints.

2.6.8.1 Political consultants testify that electioneering issue advertisements often focus on candidates as opposed to issues. Raymond Strother testifies:

> Character ads were once the province of the candidate committees. Now, however, candidates often avoid 'going negative' themselves, and rely on third parties to do this dirty work for them. If a trade association or a labor union runs an ad about the honesty and integrity-or

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[86] Two examples of 'negative' candidate-centered issue advertisements are:

Americans For Job Security Advertisement 'Are you Taxed Enough Already?'

In this advertisement, an announcer states that 'Gore plans to squeeze more money out of middle class families at the gas pump. . . . Gore's ideas are so extreme. If they ever came to pass, Americans would truly be Gored at the pump.' CMAG Storyboards [DEV 48-Tab 3].

Cheney Myanmar

This advertisement, run by an unknown group, stated that a 'brutal military regime in Myanmar . . . forced men, women and children into slave labor to assist the building of an oil pipeline by . . . Haliburton . . . we just can't trust Dick Cheney a heartbeat away from the presidency.' CMAG Storyboards [DEV 48, Tab 3; IER Tab 15.].

> lack thereof-of a candidate for federal office, their intent to influence the election is obvious and unmistakable.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Beckett Decl. ¶ 8 [DEV 6 -Tab 3] ('[I]n my experience, candidates tend to shy away from . . . negative attack ads because there would be political repercussions for them. But entities like the DCCC [Democratic Congressional Campaign Committee] and the Club for Growth do not have such constraints. Based on my observations, the candidate ads in [one] 2000 Congressional race, which were financed with federal funds ('hard money'), were actually more about 'issues' than the supposed 'issue ads' run by political parties and interest groups, which I understand were financed at least in part with non-federal funds ('soft money').').

2.6.8.2 Former Representative Larry LaRocco[87] testifies:

> In my 1994 Congressional reelection campaign, many outside interest groups targeted me for defeat, and they used soft money to advance their goal. These organizations ran television advertisements in markets my opponent did not. For example, to my knowledge, my opponent did not buy any media in the Spokane market-which covered 40% of my district-but other groups, such as pro-term limit organizations, ran ads in that market which criticized my policies. Unlike my opponent, these outside organizations were not required to disclose the sources of their funding. This tactic suggested there may have been some communication between the advertisers and my opponent's campaign.

LaRocco Decl. ¶ 5 [DEV 7-Tab 27].

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[87] LaRocco served as a Member of Congress from 1990 to 1995, representing the First Congressional District of Idaho. LaRocco Decl. ¶ 2 [DEV 7-Tab 27]. He served two terms and lost his 1994 reelection campaign. *Id.*

2.6.8.3 Evidence in the record also demonstrates that organizations run issue advertisements to assist candidates when their campaigns are low on funds, which is an indication that these advertisements serve an electioneering purpose. For example, an advertisement run during Linda Chapin's campaign for the House of Representatives by EMILY's List, praising Chapin's record on gun safety, was aired 'during a period in the first half of October 2000 when the Chapin campaign was not on the air, in order to save resources. . . . EMILY's List . . . knew I was going dark at that time. I can only surmise that they decided to run this ad at that time based on that information.' Beckett Decl. ¶ 13 [DEV 6-Tab 3]; *see also supra* Findings ¶ 2.6.1.1 (AFL-CIO memorandum discussing where media buys could be placed to help the Durbin Senate campaign which could not air advertisements due to a lack of resources).

2.6.8.4 Both negative candidate-centered issue advertisements aired to enable federal candidates to run positive advertisements and candidate-centered issue advertisements run in areas where candidates lack funding to purchase air time, provide additional indicia that corporate and labor union issue advertising is focused on influencing federal elections while avoiding FECA's restrictions.

2.6.9 In sum, I find that these examples and characteristics of electioneering issue advertisements illustrate that corporations and labor unions routinely use candidate-centered issue advocacy as a means of influencing federal elections.

2.7 *Federal Candidates and Political Parties Know and Appreciate Who Runs Candidate-Centered Issue Advertisements in Their Races*

Candidate-centered issue advertisements paid for with corporate and labor union general treasury funds and designed to influence the federal election permit corporations and labor unions to inject immense aggregations of wealth

into the process. Candidate-centered issue advertisements paid for from the general treasuries of these organizations radically distorts the electoral landscape.

2.7.1 Campaign consultants and a lobbyist testify that candidates are acutely aware of third-party interest groups who run candidate-centered issue advertisements on behalf of their candidates and that candidates appreciate the support of those organizations. Political consultant Strother testifies:

> Campaign consultants, and candidates themselves, pay very close attention to the political advertisements broadcast in their districts. Every campaign that I have been associated with in the past several years has kept very close watch on who is advertising, and when and where. Candidates, who are often already elected officials, all keep track of who is helping them, who is sitting on the sidelines, and who is attacking them. Candidates in tight races are especially grateful to the issue groups who run ads on the candidate's behalf.

Strother Decl. ¶ 13 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 19 [DEV 7-Tab 26]; Beckett Decl. ¶ 16. The uncontroverted testimony of lobbyist Wright Andrews provides:

> Sophisticated political donors-particularly lobbyists, PAC directors, and other political insiders acting on behalf of specific interest groups-are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return. Sophisticated donors do not show up one day with a contribution, hoping for a favorable vote the next day. Instead, they build longer term relationships. The donor seeks to convey to the member that he or she is a friend and a supporter who can be trusted to help the federal elected official when he or she is needed. Presumably, most federal elected

officials recognize that continued financial support from the donor often may be contingent upon the donor feeling that he or she has received a fair hearing and some degree of consideration or support.

Often, corporate clients seek their lobbyists' advice concerning how their money is best spent, whether it be by contributing their PAC's hard money directly to candidates, donating soft money to the political parties, or funding independent expenditures such as broadcast 'issue ads.' Although the answer for each client will depend upon various circumstances, including the goals that client is working to achieve, unregulated expenditures-whether soft money donations to the parties or issue ad campaigns-can sometimes generate far more influence than direct campaign contributions.

Another practice used to secure influence in Washington is for an interest group to run so called 'issue ads.' 'Issue ads' run in close proximity to elections may influence the outcome of the election. Moreover, such ads may influence the elected official who is seeking reelection to come out in support of or opposition to particular legislation due to the response local voters have to the ads. These ads are noticed by the elected officials on whose behalf, or against whom, these ads are run. An effective advertising campaign may have far more effect on a member than a direct campaign contribution or even a large soft money donation to his or her political party that is used for political purposes in his or her district or state. These ads often have the effect of showing an elected official that a lobbyist's particular issue can have consequences at the ballot box. Given how useful 'issue ads' can be in creating political clout with candidates, it is laughable to have a system that prohibits corporations and labor unions from giving even a penny to a candidate, but allows them to funnel

millions into positive or negative advertising campaigns that may influence election outcomes and that many candidates are likely to be influenced by.

Andrews Decl. ¶ 8, 13, 17 [DEV 6-Tab 1]. Plaintiffs have put forth no contrary evidence to rebut the testimony of these consultants and lobbyist.

2.7.2 Former officeholders and candidates confirm the view of the consultants that Members of Congress and federal candidates are very aware of who ran advertisements on their behalf and feel indebted to those who spend money to help get them elected. Former Senator Bumpers testifies:

> Members or parties sometimes suggest that corporations or individuals make donations to interest groups that run 'issue ads.' Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.
>
> Politicians especially love when a negative 'issue ad' airs against their opponents. If these politicians did not feel that the issue ads were helping them, they would call the people sponsoring them and tell them to stop, or they would hold a press conference and angrily denounce the ads. But that rarely, if ever, happens.

Bumpers Decl. ¶¶ 27-28 [DEV 6-Tab10]; *see also* Chapin Decl. ¶ 16 [DEV 6-Tab 12] ('Federal candidates appreciate interest group electioneering ads like those described above that benefit their campaigns, just as they appreciate large donations that help their campaigns. I appreciated the ads run by EMILY's List on my behalf. In general, candidates in the midst of a hard-fought election like mine appreciate any help that comes their way.').

2.7.3 Indeed, interest groups can be the ones who apprise politicians of the advertisements that they run on their behalf.

For example, The Coalition sent tapes of the advertisements it aired in 1996 to Joyce Gates, assistant to House Republican Conference Chairman John Boehner. FEC MUR No. 4624, Genera. Counsel's Rep., April 20, 2001, at 30 [DEV 53-Tab 6]. As the General Counsel's Report publicly indicates, the Coalition's Alan Kranowitz testified in an FEC investigation that the Coalition sent the tapes to 'show the Republican Members of the House that we were, indeed, doing something, after the fact.' *Id.* The Coalition also provided tapes of the ads to RNC Political Director Curt Anderson. *Id.* at 32; *see also* Josten Dep. at 266-67 [JDT Vol. 12] ('Those ads after they were aired were shown to Congressman Bayner [sic].'). 2.7.4 Politicians who benefit from the help provided by corporate and labor union general treasury fund spending on their races raise money for these organizations to demonstrate their appreciation. Congressman Ric Keller, for whose 2000 open-seat campaign the Club for Growth had run issue advertising, signed a Club for Growth fundraising letter dated July 20, 2001. The letter stated:

> The Club for Growth selected my race as one of its top priorities. . . .
>
> *Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.*

CFG000208-210, at CFG000208, 09 (emphasis in original) [DEV 130-Tab 5]; *see supra* Findings ¶ 2.6.5.5 (Pennington) (describing how The Club for Growth's candidate-centered issue advertisements helped Keller win the primary election).

2.7.5 Groups aggressively push to be recognized for the role they played in helping a candidate get elected to office. After Election Day, the Coalition listed ideas 'on maximizing the credit the Coalition should get for its 1996 activities,' including whether to '[m]ake a report to each Member that [it] helped and actively solicit formal thanks.' Memorandum to Alan Kranowitz, Bruce Josten and Elaine Graham from

Larry McCarthy of Cannon McCarthy Mason Limited, Next Steps for the Coalition, dated Nov. 17, 1996, TC00802-04, at TC00803 [DEV 121].

2.7.6 The AFL-CIO admits that it made the financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office known to a Member or Candidate, and known to a Political Party. Resps. AFL-CIO and COPE to FEC's First RFA's, Nos. 20-21 [DEV 12-Tab 5].

2.7.7 The AFL-CIO admits that at least one candidate or Member of Congress has expressed appreciation or gratitude for its financing of at least one political advertisement that identified a Candidate and was broadcast on television or radio within the 60 days preceding a general election in a state or congressional district in which that Candidate was running for federal office. Resps. AFL-CIO and COPE to FEC's First RFA's No. 22 [DEV 12-Tab 5].

2.7.8 Some candidates or their political committees requested or suggested that the AFL-CIO broadcast advertisements in their districts in 1996. FEC MUR 4291, General Counsel's Rep., June 9, 2000, at 21 [DEV 52-Tab 3].

2.7.9 Mellman and Wirthlin, based on their August-September 2002 poll, state:

> Americans see very little difference between the influence of a soft money donation to a political party and the funding of political ads on television and radio.... *If an individual, issue group, corporation, or labor union paid for 50,000 dollars or more worth of political ads on the radio or TV that benefitted a Member of Congress, how likely would the Member of Congress be to give their opinion special consideration because of the ads-would they be very likely, somewhat likely,*

somewhat unlikely, or very unlikely to give them special consideration because of the ads, or don't you have an opinion on this?

80% TOTAL LIKELY

37% Very likely

43% Somewhat likely

10% TOTAL UNLIKELY

5% Somewhat unlikely

5% Very unlikely

9% Don't have opinion

0% Don't know Refused

Mellman and Wirthlin Report at 9-10 [DEV 2-Tab 5]; *see also* Resp. NAB to FEC's First RFA's, No. 3. [DEV 12-Tab 7] (admitting 'that access to members of Congress and Executive branch officials is one factor out of many that might conceivably affect federal legislation and executive decisions and policies assuming all other circumstances are equal').

2.7.10 Political parties are equally grateful for the support that issue advocacy organizations perform for their candidates.

2.7.10.1 An internal RNC document entitled 'Coalitions Plan' states:

> The RNC Coalitions effort should be judged by the simple question-will it get us more votes on election day?
>
> Their [sic] will no doubt need to be countless meetings, committees, and tribunals to provide *all the customary access that the myriad of entities have come*

> *to expect*, but ultimately every activity that we engage in should be done to win votes. . . .
>
> There are many organizations that can routinely deliver measurable influence of behalf of Republicans, but there are five groups that have distinguished themselves. The RNC should give these five organizations a great deal of attention. These groups are the:
>
> National Rifle Association
>
> National Right to Life Committee
>
> National Right to Work Committee
>
> National Federation of Independent Business Christian Coalition
>
> These organizations deliver a disproportionate percentage of the Republican Base on election day. They should receive special and constant attention. We must prioritize our limited resources toward these organizations. . . .
>
> An important aspect of any RNC Coalitions work will be done to engage the many other organizations that work within the political arena. . . .
>
> The RNC will establish a regular meeting of key organizations. This meeting should be held at least three times a year. The emphasis should by on the free exchange of important information about the upcoming elections. Each meeting should be an event featuring the Chairman, Co-Chair, RNC Regional Field Representatives and at least one high pro-file [sic] Member of Congress. Examples would be Newt Gingrich, Trent Lott, Dick Armey, etc.

RNC0275390-RNC0275396, at RNC0275390-91 [DEV 97] (emphasis added).

2.7.10.2 An RNC slide show presented how interest group broadcast issue advocacy was used to help candidates in the 2000 election cycle:

> Outside Help for Democrats in 2000
>
> > Liberal groups spent record amounts assisting Democrats in 2000. Highest Issue Advertising Spenders: Planned Parenthood-$14 million, NAACP-$10.5 million, Sierra Club-$9.5 million. NARAL-$7.5 million.

(Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').

> Outside Help for Republicans
>
> > Business Roundtable-$6 million (2/3rds supporting Republicans), NRA-$15/20 Million

(Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').

> Impact of Third Party Spending for the 2000 Cycle
>
> > In 2000 it was estimated that more than $509 million was spent on issue advocacy television and radio advertising. Third parties accounted for almost $347 million (68%) of this spending.

Republican Party-$83.5 million (16%), Democratic Party-$78.4 million (15%).

> > (Annenberg Public Policy Center of the University of Pennsylvania, 'Issue Advertising in the 1999-2000 Election Cycle').

RNC Counsel's Office, ''Soft' Dollars: What They Mean for the Republican Party,' RNC0248802-RNC0248809, at RNC0248808-09 [DEV 97] (emphasis in original).

2.7.10.3 An RNC document states that 'third party special interests [sic] groups . . . are permitted to raise and spend soft money for issue advocacy purposes. Liberal special interest groups spent record amounts assisting Democrats in 2000 . . . . In fact, of the $500 million spent on issue advertisements during the 2000 cycle, 68% ($347 million) was spent by third part[y] special interest groups—more than twice the amount spent by both political parties combined.' 'Issue Updates Campaign Finance Reform Concerns and Effects,' RNC0318573-RNC0318576, at RNC0318575 [DEV 98].

2.7.10.4 On October 18, 1996, the RNC, through its non-federal component, the Republican National State Elections Committee, gave $500,000 to the National Right to Life Committee with a cover letter from RNC Chairman Haley Barbour to NRLC Executive Director David O'Steen stating: 'Your continued efforts to educate and inform the American public deserves [sic] recognition.' RNC0065691A [DEV 134-Tab 8]; *see also* RNC0065691 [DEV 134-Tab 8] (copy of the check). In October 1999, the National Right to Life Committee received a $250,000 donation from the NRCC which was 'put in NRLC's general fund.' Resps. Nat'l Rt. Life Pls. to Defs' First Interrogs., No. 3 [DEV 10-Tab 15]. NRLC representatives 'were present at a meeting with Rep. Tom Davis when he presented the check to National Right to Life.' *Id.*

2.7.10.5 DNC Political Director Gail Stoltz spoke generally about the recent developments of using issue advertising for electioneering purposes. Stoltz stated: 'In my experience, issue ads affect elections. The ads can either demoralize or confuse voters so that they do not vote, or they can energize a voter base for or against a party or its candidates. During a presidential election year, the ads definitely make a difference when a presidential candidate is featured.' Stoltz Decl. ¶ 16 [DEV 9-Tab 39].

2.7.10.6 Political parties and candidates have directed donors who have maxed out their federal contributions to give money to nonprofit corporations who can then spend money on issue advocacy. Robert W. Hickmott provides the following uncontroverted testimony:

> As both a contributor to candidates and parties, and as a lobbyist who advises clients about political spending, I am personally aware of the fundraising practices of federal candidates. Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign. These types of requests typically come from staff at the national party committees, the campaign staff of the candidate, the candidate's fundraising staff, or former staff members of the candidate's congressional office, but they also sometimes comes [sic] from a Member of Congress or his or her chief of staff (calling from somewhere other than a government office). Regardless of the precise person who makes the request, these solicitations almost always involve an incumbent Member of Congress rather than a challenger. As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate financially in his or her election effort, both with hard and soft money.

Hickmott Decl. ¶ 8 [DEV 6-Tab 19]. 2.7.11 While the record does not have any direct examples of votes being exchanged for candidate-centered issue advocacy expenditures, I find that the record demonstrates that candidates and parties appreciate and encourage corporations and labor unions to

deploy their large aggregations of wealth into the political process. If nothing else, I find that the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups.

2.7.12 Accordingly, I find that Congress was correct in concluding that a problem existed with the state of FECA. Corporations and labor unions were routinely spending general treasury funds on advertisements designed to influence federal elections and they were able to use general treasury funds to pay for the most potent form of political advocacy-advertisements that do not use words of express advocacy. This conclusion leads to the following question: are candidate-centered issue advertisements objectively distinguishable from pure issue advertisements so that one may distinguish genuine issue advocacy from electioneering without considering subjective factors? The record unequivocally answers that question in the affirmative.

2.8 *Candidate-Centered Issue Advertisements Are Empirically Distinguishable from 'Pure' Issue Advertisements*

Pure issue advertisements are empirically distinguishable from candidate-centered issue advertisements designed to influence an election on a number of bases: (a) issue advertisements designed to influence federal elections almost always identify a candidate for federal office; (b) issue advertisements designed to influence federal elections are generally run in close proximity to a federal election; and (c) issue advertisements designed to influence a federal election are run in states and congressional districts with close races.

2.8.1 *Candidate-Centered Issue Advertisements Almost Always Identify a Candidate for Federal Office*

I find that issue advertisements designed to influence a federal election almost always refer to specific candidates by

name. Generally speaking, pure issue advertisements are less likely to refer to a federal candidate by name.

2.8.1.1 The uncontroverted testimony of political consultants who have designed genuine issue advertisements confirms this finding. Plaintiffs failed to produce any political consultants who have designed issue advertisements to rebut directly this testimony.

- Political consultant Doug Bailey testifies:

> In addition to the work we did for candidates at Bailey, Deardourff, we also did political ads for political parties and issue groups. When we were creating true issue ads (e.g, for ballot initiatives . . .), and when we were creating true party building ads, *it was never necessary for us to reference specific candidates for federal office in order to create effective ads*. For instance, we created a serious [sic] of ads opposing a . . . referendum in Florida which made no reference to any candidates. We were successful in conveying our message, and the referendum failed two to one. . . .
>
> Similarly, issue organizations can design true issue ads without ever mentioning specific candidates for federal office. *In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections*. From a media consultant's perspective, there would be no reason to run such ads if your desire was not to impact an election. This is true not only in the 60 days immediately prior to an election, but probably also in the 90 or 120 days beforehand.

Bailey Decl. ¶¶ 9, 11 [DEV 6-Tab 2] (emphasis added); *see also* Strother Decl. ¶ 7 [DEV 9-Tab 40] (emphasis added)

(observing that the pure issue advertisements he had made during his career 'did not mention any candidates by name. Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election.').

2.8.1.2 Uncontroverted expert testimony likewise confirms the view that issue advertisements designed to influence a federal election almost always mention the name of a federal candidate. Krasno and Sorauf Expert Report at 55-56 [DEV 1-Tab 2] ('The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates. Candidate names appear in virtually all of these spots, with candidates most likely to identify themselves in their ads and candidate-oriented issue ads most likely to identify the opposing candidate (in some pejorative way). Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office . . . .").

2.8.1.3 A sampling of issue advertising campaigns demonstrates that candidates are often mentioned in the advertisements only as election day approaches.[88]

- *Citizens for Better Medicare ('CBM')*

During the final three weeks before the 2000 federal election, CBM aired 6,010 spots that mentioned a candidate and only eight spots that did not mention a candidate. Goldstein Expert Report, App. A, Tbl. 17A [DEV 3-Tab 7]. In the final 63 days before the election, CBM ran a total of 14,975 advertisements. *Id.* Of these advertisements 10,876 mentioned a federal candidate, while 4,099 did not mention a

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[88] Evidence for this finding is based on the Expert Report of Kenneth M. Goldstein. Goldstein compiled this information from data supplied by Campaign Media Analysis Group (CMAG). Goldstein Expert Report at 2 [DEV 3-Tab 7]. Although Plaintiffs question the completeness and accuracy of the CMAG data, I accept the CMAG data as a valid database. *See infra* Findings 2.12.1. Moreover, nowhere do Plaintiffs challenge the data of when candidates' names were mentioned in the advertisements.

federal candidate. *Id.* From January 1 through September 4, 2000, CBM ran 23,867 television spots, *none* of which mentioned a candidate. *Id.*

- *Chamber of Commerce*

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Chamber of Commerce ran a total of 7,574 advertisements. *Id.* Tbl. 17B. *All* of these advertisements were run in the seven weeks before the election and *all* of these advertisements mentioned a federal candidate. *Id.*

- *Planned Parenthood* [89]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Planned Parenthood ran a total of 6,523 advertisements. *Id.* Tbl. 17C. In the 63 days before the election, 185 advertisements were run that did not mention a federal candidate, while 5,916 advertisements were run that mentioned a federal candidate. *Id.* (noting that the only time Planned Parenthood ran advertisements that mentioned a federal candidate's name was in the five weeks prior to the election).

- *AFL-CIO*

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the AFL-CIO ran a total of 18,324 advertisements. *Id.* Tbl. 17D. In the 63 days before the election 10,099 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, the AFL-CIO ran no advertisements that did not mention a federal candidate. *Id.*

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[89] The Annenberg Report describes Planned Parenthood as 'a pro-family planning political advocacy group.' Annenberg Report 2001 at 24 [DEV 38 -Tab 22].

- *Women Voters: A Project of Emily's List* [90]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Emily's List ran a total of 2,680 advertisements. *Id.* Tbl. 17E. In the 63 days before the election, 7 advertisements were run that did not mention a federal candidate, while 2,665 advertisements were run and each mentioned a federal candidate. *Id.* (noting that the only time Emily's List ran advertisements that mentioned a federal candidate's name was in the seven weeks prior to the election).

- *Americans for Job Security* [91]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), Americans for Job Security ran a total of 6,062 advertisements. *Id.* Tbl. 17F. In the 63 days before the election, 5,073 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, Americans for Job Security ran only advertisements that mentioned federal candidates. *Id.*

- *Business Round Table* [92]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Business Round Table ran a total of 8,158 advertisements. *Id.* Tbl. 17G. In the 63 days before the election, 4,571 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, the

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[90] The Annenberg Report describes Emily's List as 'an organization dedicated to helping Democratic women who support abortion rights get into office.' Annenberg Report 2001 at 22 [DEV 38-Tab 22].

[91] The Annenberg Report describes Americans for Job Security as a 'pro- business lobbying group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

[92] The Annenberg Report describes the Business Round Table as 'an organization that represents the CEO's of America's largest corporations.' Annenberg Report 2001 at 20 [DEV 38-Tab 22].

Business Round Table ran only advertisements that mentioned federal candidates. *Id.*

- *Handgun Control* [93]

  Between January 1, 2000, and Election Day 2000 (November 6, 2000), Handgun Control ran a total of 3,383 advertisements. *Id.* Tbl. 17H. In the 63 days before the election, 3,146 advertisements were run and each mentioned a federal candidate. *Id.* During this same time period, Handgun Control ran only advertisements that mentioned federal candidates. *Id.*

- *Sierra Club* [94]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the Sierra Club ran a total of 2,270 advertisements. *Id.* Tbl. 17I. In the 63 days before the election, 22 advertisements were run that did not mention a federal candidate, while 1,707 advertisements were run that did mention a federal candidate. *Id.*

- *League of Conservation Voters* [95]

Between January 1, 2000, and Election Day 2000 (November 6, 2000), the League of Conservation Voters ran a total of 5,027 advertisements. *Id.* Tbl. 17J. In the 63 days before the election, 371 advertisements were run and each advertisement did not mention a federal candidate, while 1,705 advertisements were run that mentioned a federal

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[93] The Annenberg Report describes Handgun Control as an 'advocacy group supporting legislation to promote gun safety.' Annenberg Report 2001 at 25 [DEV 38-Tab 22].

[94] The Annenberg Report describes the Sierra Club as 'a pro-environment advocacy group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

[95] The Annenberg Report describes the League of Conservation Voters as a 'pro-conservation advocacy and education group.' Annenberg Report 2001 at 23 [DEV 38-Tab 22].

candidate. *Id.* (noting that the only time the League of Conservation Voters ran advertisements mentioning a federal candidate's name was in the eight weeks prior to the election).

2.8.1.4 Candidate-centered issue advertisements almost always name a federal candidate. This finding is neither surprising nor controverted. As the examples of the interest group advertisements indicate, however, issue advertisements generally start naming a federal candidate only as the election draws near.

2.8.2 *A Majority of Candidate-Centered Issue Advertisements are Run in Close Proximity to a Federal Election*

As the sampling of interest group advertisements above illustrates, as the election draws near, advertisements that name a federal candidate are much more common than issue advertisements that do not name a federal candidate. I find that most candidate-centered issue advertisements appear in close proximity to a federal election. In the case of the general election, which has been most heavily studied, it is clear that candidate-centered issue advertisements are most prevalent within sixty days of a federal election.

2.8.2.1 The Annenberg Public Policy Center found that by the last two months before the election, almost all televised issue spots made a case for or against a candidate. Annenberg Report 2001 at 14 [DEV 38-Tab 22]. The Annenberg Report, a study relied on by Plaintiffs, concluded:

> The type of issue ad that dominated depended greatly on how close we were to the general election. During the two-year election cycle 71% of distinct issue ads were candidate-centered, 16% were legislation-centered, and 13% were general-image centered. However, distinct ads from before the final two months of the election were 43% candidate-centered, 35% legislation centered, and

22% general-image oriented. That picture flipped when looking at unique ads from the last two months of the election. In that case fully 89% of unique ads were candidate-centered, while just 3.6% were legislative centered, and 7.4% were general-image issue ads. *In other words candidate-centered issue ads became much more prominent as the election approached. . . .*

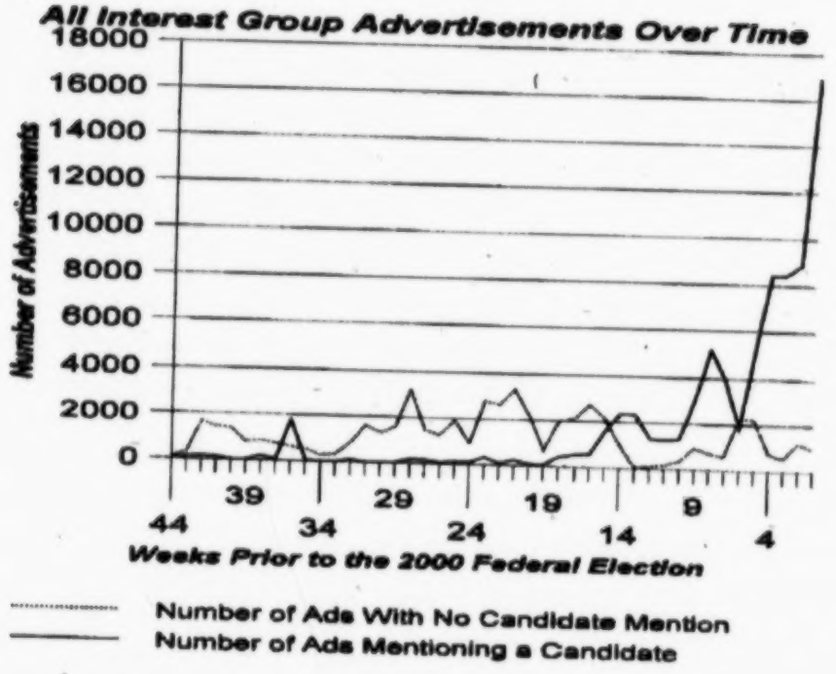
When we took into account how many times these ads aired and not just the number of different ads, we found an even greater percent were candidate-centered. Television spots airing after Super Tuesday were 87% candidate centered, 9.5% legislative-centered, and 3.6% image oriented. By breaking that time period down further and looking only at spots that aired September to November, we found that there was a greater percentage of candidate-centered ads in the last two month of the campaign than in the last eight. *Fully 94% of issue ads aired after August made a case for or against a candidate*. Just 3.1% were legislative ads, and 2.3% were general image ads. Though candidate-centered issue ads always made up a majority of issue ads, as the election approached the percent candidate-centered spots increased and the percent of legislative and image ads decreased, such that *by the last two months before the election almost all televised issue spots made a case for or against a candidate. Id.* (emphasis added).

2.8.2.2 In the sixty days prior to a federal election, interest group advertisements that mention a federal candidate rise dramatically, whereas issue advertisements that do not mention a federal candidate remain fairly constant during the course of the year.[96] A graph using data from the 2000

[96] The Chart is based on data compiled by Kenneth Goldstein. Goldstein Expert Report, App. A, Table 16 [DEV 3-Tab 7]. Goldstein observed all interest group advertisements run during the forty-four weeks prior to the election using CMAG data. Although Plaintiffs dispute the completeness of his data set, *see* Appendix, none of the experts have criticized that the data demonstrates that in the sixty days prior to a federal election, the clear majority of issue advertisements mention the name of a federal candidate.

election cycle compiled by Kenneth Goldstein illustrates this point:

by Kenneth Goldstein illustrates this point:



2.8.2.3 The uncontroverted testimony of experts confirms that the airing of issue advertisements designed to influence a federal election is at its zenith in the final weeks prior to an election. Magleby Expert Report at 18 [DEV 4-Tab 8] ('Genuine issue ads are more generic or 'educational' on their face than ads that are electioneering in nature. They are also rare in the period before an election.'); *id.* at 33 ('In the contests we monitored in 1998, most interest group electioneering advocacy came in the final weeks of the campaign. In 2000, 58% of the interest group electioneering advocacy came in the last two weeks of the election.');

Goldstein Expert Report at 17 [DEV 3-Tab 7] ('The CMAG database provides empirical evidence of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office.'). The conclusions of these experts has not been contradicted by any contrary expert testimony introduced by Plaintiffs in this litigation.

2.8.2.4 As the Annenberg Center, experts in this case, and the empirical data establish, candidate-centered issue advocacy is run in close proximity to federal elections.

2.8.3 *A Majority of Candidate-Centered Issue Advertisements Are Run in States and Congressional Districts with Close Races*

2.8.3.1 The empirical data and the uncontroverted testimony of experts and political consultants in this case demonstrate that candidate-centered issue advertisements are run in congressional districts or states where there are close races.

2.8.3.2 Defense expert Magleby states that:

> Interest groups . . . take aim at particular states with competitive U.S. Senate races or congressional districts where the outcome is in doubt. In 1998, 2000, and 2002, I conducted numerous interviews with key staff in scores of interest groups to assess where they engage in electioneering advertisements. . . . The widely shared view of interest groups is that they campaign where their investment can make a difference and that is almost always in competitive contests. This tendency has been reinforced by the exceedingly close margin of party control in Congress in recent years. Interest groups routinely do their own polls to inform them on where to spend their electioneering advocacy money. For example, before they sent mailings, the NEA [National Education Association] conducted surveys to determine 'if they could make a difference' with their spending.

Magleby Report at 31 (footnotes omitted) [DEV 4-Tab 8]; *see also* Krasno and Sorauf Report at 57 (footnote omitted) [DEV 1-Tab 2] (Candidate and candidate-oriented issue ads 'are narrowly targeted to air in only the most closely contested elections.').

2.8.3.3 Political consultants also provide uncontroverted testimony that candidate-centered issue advertisements are concentrated on competitive races in the weeks before a federal election. Political consultant Strother testifies:

> In addition to mentioning a candidate and proximity in time to election day, another informative factor is to look at where the ad was run. When media consultants want to influence elections, they air their ads in competitive districts and battleground states. Thus, in addition to looking at the ad itself, to discern electioneering intent you might also look at the Cook Report of competitive or 'toss-up' races. Those are the most likely places where the advertisements could have an impact on the outcome of an election. Thus, when a political party or an issue group focuses an advertising campaign on competitive districts, the intent to influence the election is clear. By contrast, when the goal is to persuade members of Congress to vote one way or another on a piece of pending legislation, an issue ad campaign will be targeted at the undecided members.

Strother Decl. ¶ 9 [DEV 9-Tab 40]; *see also* Lamson Decl. ¶ 6 [DEV 7-Tab 26] ('Parties and groups generally run these pre-election 'issue ads' only in places where the races are competitive.').

2.8.3.4 Empirical data likewise demonstrates that candidate-centered issue advertisements are concentrated in congressional districts and states with contested elections. 'The CMAG database[97] shows that interest group financed television ads that mentioned a candidate and were broadcast within 60 days of an election were highly concentrated in states and congressional districts with competitive races.' Goldstein Expert Report at 20 [DEV 3-Tab 7] ('As shown in Table 5, during the 2000 senatorial elections, 89.2 percent of such interest group ads ran in states where the race was competitive. Four states accounted for 77 percent of the ads broadcast by interest groups; political parties broadcast 65 percent of their ads in these four states. Interest group ads were particularly important in Michigan, where interest groups broadcast 22 percent of the total ads broadcast in the race.');[98] *id.* at 21 ('The geographical distribution of interest group ads in Senate elections closely paralleled that of the political parties, which ran 90.6 percent of their ads in those competitive states. The same was true in House elections. As demonstrated in Table 6, during 2000, 85.3 percent of interest group financed ads broadcast within 60 days of the election were aired in congressional districts with competitive

[97] The CMAG data is discussed in detail in the Appendix to my opinion and Finding ¶ 2.12.1.

[98] In determining which races were competitive, Goldstein relied on his professional judgment as informed by various media sources including the Cook Report which he attached to his expert report. Goldstein Expert Report at 20 n.17 [DEV 3-Tab 7]. The Cook Report is also used by Plaintiffs to handicap races. LaPierre Dep. at 196 [JDT Vol. 14] ('Q. What were your sources of information from which you determined which races were close or which races were in battleground states or whatever? A. Newsletters, the media, just the general turning on the television. I mean, everybody-there are no secrets in-when you get into a campaign, I mean, everybody knows. I mean, it's-the columnists, the TV, the radio, the-I mean, every newsletter you pick up, whether it's the Cook Report. . . ."); Ryan Dep. at 76-77 [JDT Vol. 27] (recalling that he would check the Cook Report to find out which races of Congress were competitive).

elections. Similarly, the political parties ran 98.2 percent of their ads in those districts.') (footnotes omitted); *see generally id.* at 3, 20-24, Tbls. 5-6; Krasno and Sorauf Report, App. Tbls. 4-5 [DEV 1-Tab 2]; *see also Buying Time* 2000 at 53 [DEV 46] ('The competitiveness of candidate races also affects the magnitude and timing of political advertising.'). This expert testimony has not been challenged by Plaintiffs with any contrary expert evidence.

2.8.3.5 Indeed, even Plaintiff NRA admits that it targets its issue advocacy campaigns toward competitive races. NRA Executive Vice President Wayne LaPierre testified that ' the other thing that makes an impact on what the NRA does is NRA-NRA, in terms of its election efforts-and when I say NRA, I'm including the whole organization-tends to focus on competitive races.' LaPierre Dep. at 118 [JDT Vol. 14]; *see also id.* at 105 ('Q. Is it correct that the NRA spent as much as it could to get its message to gun owning voters in critical swing states? A. That's true.') 196 ('Okay. Now, we've talked a little bit about the location of your ads and that they were at least concentrated on close races or battleground states. You and I may differ on whether that-A. Right. Q.-where the proportion is, but they're concentrated on those races. A. Right.'); *supra* Findings ¶ 2.6.4.1 (national election media recommendations by NRA media consultant who proposes focusing issue advocacy on ten congressional seats in 'battle ground' states).

2.8.4 In sum, the uncontroverted record establishes that pure issue advocacy is empirically distinguishable from candidate-centered issue advocacy on the basis of (a) whether the federal candidate is named; (b) whether the advertisement is run in close proximity to a federal election; and (c) if the advertisement is run in a competitive race. As the uncontroverted testimony of Defense expert David Magleby states:

> A number of indicia make clear that the ads run by individuals and interest groups are in reality

> electioneering ads that are meant to influence, and do influence, elections: These electioneering ads *generally* name a candidate, run close in time to the election, target the named candidate's district, are run primarily in competitive races, and generally track the themes in the featured candidate's campaign.

Magleby Report at 6 [DEV 4-Tab 8] (emphasis added). Magleby outlines a general rule that candidate-centered issue advertising is distinguishable from pure issue advertising.

2.8.5 Despite being able to empirically distinguish candidate-centered issue advocacy from pure issue advocacy, the record demonstrates that it is very difficult, if not impossible, to determine the objective behind an advertisement by simply listening or viewing the advertisement; particularly when that advertisement is viewed outside the context of the election.

2.8.5.1 Political Consultant Raymond Strother testifies:

> None of us, without understanding the context and the time, can tell you what a sham ad is and a nonsham ad. You can't do that by looking at pictures or even looking at the ads. When I was teaching at Harvard, I brought Doug Bailey up to lecture my class. He showed [a] series of commercials, and he said, 'Okay, which is the best commercial,' and everybody voted. 'The worse commercial,' and everybody voted. He said, 'You're all wrong. There is no best or worse commercial because none of you are qualified to judge these commercials because you don't know the context in which they were run or the problems they were to solve.' When I look at storyboards, I have no way of knowing if they're fake, real, et cetera, because I don't know the time—I don't know anything about them.

Strother Cross Exam. at 90-91. Strother's testimony demonstrates that it is difficult to discern the true purpose of

an advertisement without viewing it in its context. Rather, as discussed above, the best way to distinguish pure issue advocacy from candidate-centered issue advocacy is through empirical variables dealing with when and where the advertisement is run, and whether it mentions a federal candidate.

2.8.5.2 An example of the difficulty of discerning the objective behind an advertisement is presented by Defendants and comes from the 1998 Senate campaign between incumbent Senator Lauch Faircloth and now-Senator John Edwards. An advertisement run during the campaign by the American Association of Health Plans ('AAHP') told viewers to call Senator Faircloth 'today and tell him to keep up his fight' against trial lawyers' efforts to pass new liability laws. Gov't Opp'n at 82-83; Def. App. C, Tab 1 at 1 ('Look Out for the Lawyers').[99] Defendants point out that this advertisement might appear to be an example of 'genuine issue advocacy' if not for the fact that '[a]t the time this ad was run, the airwaves in North Carolina were saturated with millions of dollars of ads run by Senator Faircloth's campaign, by the Republican party, and by interest groups portraying Edwards as a 'deceptive,' truth stretching trial lawyer. Edwards' own campaign ads trumpeted Edwards as a trial lawyer 'fighting

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[99] The text of the advertisement is as follows:

> Worried about rising healthcare costs? Then look out for the trial lawyers. They want Congress to pass new liability laws that could overwhelm the system with expensive new healthcare lawsuits. Lawsuits that could make the trial lawyers richer. That could make healthcare unaffordable for millions. Senator Lauch Faircloth is fighting to stop the trial lawyers [sic] new laws. Call him today and tell him to keep up his fight. Because if trial lawyers win, working families lose.

Def. App. C, Tab 1 at 1. This advertisement was submitted by Plaintiffs on a CD as a 'powerful illustration of the . . . type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications." McConnell Br. at 61.

for the people.'' Gov't Opp'n at 83; *see also* Def. App. C, Tab 1 at 2 (Faircloth-sponsored advertisement titled 'Stretch the Truth,' asking: 'Who teaches other lawyers how to stretch the truth? Meet personal injury lawyer John Edwards.'); *id.* at 3 (Faircloth-sponsored advertisement titled 'You are,' telling voters they were paying for Edwards' campaign because '[h]e makes millions suing people. Our hospitals and family doctors, so we all pay more for medical care'); *id.* at 4 (Faircloth-sponsored advertisement titled 'The Truth,' stating 'Newspapers say '. . . [Edwards] has the lawyer's habit of stretching the truth.'); *id* at 7 (Edwards-sponsored advertisement titled 'Who I Am,' which states: 'As a young lawyer, I decided to represent people, not big insurance companies.'); *id* at 5-6, 8-12.

2.9 BCRA's Restriction on 'Electioneering Communication'

As discussed earlier, Congress clearly recognized that labor unions and corporations were easily evading FECA's prohibition on their use of general treasury funds to influence federal elections by running broadcast advertisements that did not use words of express advocacy but were clearly designed to influence federal elections. Moreover, as discussed above, these general treasury funds purchased the most effective form of political communication. In *Buckley*, the Supreme Court observed that 'the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.' *Buckley*, 424 U.S. at 42. For this reason, the Supreme Court made clear that a test distinguishing between a discussion of issues and a discussion of candidates that relied on the subjective intent of the listener was problematic. *Id.* at 44 ('In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and

meaning. Such a distinction offers no security for free discussion.') (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). In enacting Title II's restriction on 'electioneering communication,' Congress recognized the Supreme Court's admonition in *Buckley* that legislation distinguishing between issue advocacy and candidate discussion must, if at all possible, avoid reliance on the subjective impressions of the listener. BCRA accomplishes this feat with the primary definition of electioneering communication.

2.9.1 Section 203 of BCRA extends the prohibition on corporate and labor union general treasury funds being used in connection with a federal election to cover 'electioneering communication'. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Section 201 of BCRA amends section 304 of FECA by adding the following definition of an 'electioneering communication':

> (i) The term 'electioneering communication' means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office; (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A). Under this definition, in order to constitute an electioneering communication, therefore, the communication (a) must be disseminated by cable, broadcast, or satellite, (b)

must refer to a clearly identified Federal candidate, (c) must be distributed within certain time periods before an election, and (d) must be targeted to the relevant electorate. *Id.* The fact that the communication must be 'targeted to the relevant electorate,' means that, in the case of House and Senate races, the communication will not constitute an 'electioneering communication' unless 50,000 or more individuals in the relevant Congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C).

2.9.2 By adopting a definition of electioneering communication that by and large is premised on the empirical determinants that Congress found distinguish pure issue advocacy from candidate-centered issue advocacy, Congress adopted a definition of electioneering communication that rejected reliance on the subjective impressions of the listener and focuses on objective variables that do an impressive job, in most circumstances, of distinguishing between candidate-centered issue advertising and pure issue advertising. The lone question remaining is whether the primary definition of electioneering communication is narrowly tailored to capture candidate-centered issue advocacy from pure issue advocacy. After carefully reviewing the evidence in the record, I conclude that it is narrowly tailored.

2.10 *The Primary Definition of Electioneering Communication is Narrowly Tailored to Radio & Television Advertisements*

Electioneering communication is narrowly defined to only include communications disseminated by cable, broadcast, or satellite. By including only the media that were found by Congress to be problematic, the primary definition of electioneering communication is narrowly tailored.

2.10.1 Defense expert Magleby observes that broadcast advertising is the most prevalent form of communicating candidate-centered issue advocacy. Magleby states that

> [b]roadcast advertising is the most visible mode of communicating an electioneering message and is believed to be the most effective for reaching a mass audience. In all of the contests we monitored in 1998 and 2000, interest groups used broadcast, including television and radio, to communicate with voters. . . .

Broadcast advertising was an especially important element in all of the competitive races we monitored in 2000. . . . In Senate races, television and radio were also major components of the candidate and outside money campaigns. . . .

Radio is also an effective communications tool for electioneering by interest groups. As with television, if the communications do not use the particular language of express advocacy, the groups do not report the expenditures to the FEC, and stations do not provide the same disclosure that they provide for campaign communications by candidates. Academics monitoring our sample of competitive contests in 2000 found the interest groups making use of radio for electioneering efforts included the NRA, Americans for Limited Terms, U.S. Chamber of Commerce, NFIB, NEA, League of Conservation Voters, Million Mom March PAC, Planned Parenthood and the National Right to Life PAC. Of the 105 radio ads we recorded, only 20 ads contained the magic words. Magleby Expert Report at 22 [DEV 4-Tab 8].

2.10.2 Those intimately involved in making candidate-centered issue advertisements confirm this expert testimony.

- Denise Mitchell, Special Assistant for Public Affairs to AFL-CIO President John J. Sweeney, confirms this conclusion. Mitchell states:

  The AFL-CIO also sometimes purchases newspaper advertising for its issue advocacy. We have usually done

> so in newspapers with high readership among Members of Congress and their staffs . . . . When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle-class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key part of our strategy and effectiveness.

Declaration of Denise Mitchell ¶ 28 [6 PCS]; *see also id.* ¶ 29 (explaining why the AFL-CIO does not use direct mail or telephone banks to reach the general public).

- Political consultant Rocky Pennington testifies that

> [e]ffective electioneering is crucial in political campaigns. Television, an emotion-based medium, is the most effective. Radio can also be effective, depending on the specific market you're trying to reach. For example, if you're in a Republican primary and want to reach Republican males between the ages of 18 and 45, Rush Limbaugh radio is probably a good buy. Direct mail can also be very effective, in a different way, since it is more of an information-based medium. You're reaching voters at different levels, and it's good to have a good mix. The above media are good for both candidate and third party communications in a campaign.

Pennington Decl. ¶ 9 [DEV 8-Tab 31]. Pennington provides an example of a particularly effective candidate-centered issue advertisement run on the radio:

> Other interest groups also ran ads trying to elect Mr. Keller in the Republican primary and the run-off. One ad run against Mr. Sublette that I thought probably cost us a couple points in the primary was a radio spot run, as I recall, primarily on conservative talk radio and maybe some Christian stations by Americans for Limited Terms. This ad attacked Mr. Sublette on tax and other issues, basically calling him a big government liberal, while praising Mr. Keller as a real conservative.

Id. ¶ 16.

Communications consultant Angus McQueen, who has 'provided strategic communications advice and services to the' NRA and the NRA PVF for approximately 22 years, states that among the various media outlets 'for conveying [NRA's] message, the most powerful is the use of 'paid broadcast media,' which simply refers to paid media that is broadcast over network, cable, or satellite television, or over the radio.' McQueen Decl. ¶¶ 3, 10 [11 PCS].

2.10.3 As a result of the following testimony and discussion, I disagree with the NRA's contention that '[a]ds broadcast over the internet are comparable to those broadcast over TV and radio in terms of their public reach and impact.' Proposed Findings of Fact of the NRA and NRA PVF ¶ 22. In support of this finding, the NRA cites only to three items of evidence. This evidence does not support the NRA's conclusion.

2.10.3.1 The first piece of evidence is the declaration of Angus McQueen, the NRA's long-time communications consultant, which notes that the Internet has become an '*increasingly important* part of how information becomes disseminated in our society,' resulting in 'information [being]

disseminated more rapidly, by a greater variety and multitude of diverse sources, than in was in the past.' McQueen Decl. ¶ 17 [11 PCS] (emphasis added). 'Thus, as illustrated by the popularity of the NRA's website and its 'NRA Live!' service [a daily NRA webcast news program], groups like the NRA have in a sense taken over part of the role previously played by the media.' *Id.* This testimony only observes that the Internet is becoming an 'increasingly important' means of communication. It makes no effort to compare traditional television and radio advertising to Internet communications. With the NRA's webcast, 'NRA Live!', viewers make a choice to go to the website and download or watch the program, while advertisements on television and radio are aired throughout programming without any viewer choice. The NRA fails to explain this critical distinction. The Internet and television and radio advertising are completely different forms of media and without testimony comparing the two, I find this evidence does not support the NRA's conclusion.

2.10.3.2 The second piece of evidence is a submission of 'NRA Live!' viewership statistics for the periods of March 1999 through March 2000 and March 2001 through August 2002. NRA App. at 322-23. The NRA makes no effort to compare these numbers to traditional television and radio ratings and therefore it is impossible from this submission to determine if the NRA Internet program has a comparable impact to that of traditional television and radio advertising. Moreover, the viewership statistics are missing data during the period of April 2000 through to March of 2001; precisely the period around the 2000 federal election. As a result, the data does not even demonstrate if the NRA program was being viewed more or less during the election cycle.

2.10.3.3 Third, the NRA provides two videotapes containing multiple editions of 'NRA Live!' Broadcasts. NRA App. I. This evidence does absolutely nothing to prove

that the Internet has the same impact as television and radio broadcasting.

2.10.3.4 In sum, I do not find that the Internet is now, or was, a comparable medium to television and radio broadcast advertising. Indeed, the NRA's own media consultant testifies that 'paid media that is broadcast over network, cable, or satellite television, or over the radio,' is the 'most powerful' medium for conveying its message. McQueen Decl. ¶ 10 [11 PCS]. If the Internet medium was as effective as the NRA claims, then it is unclear why the NRA spent as much money on candidate-centered broadcast issue advertising as it did during the 2000 elections. Why not just spend the funds on Internet advertising if that were as effective? The NRA does not answer this question.

2.10.4 Although there seems to be agreement that direct mail is an important tool of campaigning, there is no evidence in the record that it is nearly as effective as broadcast advertising. Defendants' expert Magleby states that campaign mail 'can be very effective.' Magleby Expert Report at 25 [DEV 4-Tab 8]. Rocky Pennington, a political consultant, comments that direct mail is usually a component of political campaign plans. Pennington Decl. ¶ 3 [DEV 8-Tab 31]. Much like newspaper advertising, direct mail is 'a more passive medium, with less immediacy than broadcast, and [is] less likely to generate action.' Mitchell Decl. ¶ 28 [6 PCS]. Accordingly, I do not find direct mail to be as effective or as problematic as broadcast candidate-centered issue advertising.

2.10.5 For the same reason I do not find newspaper advertising to be as effective as candidate-centered issue advertisements broadcast on radio and television. The NRA proposes the following finding:

> Newspaper ads often dwarf broadcast ads, especially radio ads, in terms of their expense. For instance, a full-

page ad in the *New York Times* would cost $65,000 whereas a 60 second radio broadcast that recites precisely the same text in a small market such as Peoria would cost only $75.

Proposed Findings of Fact of the NRA and NRA PVF ¶ 20. In support of this statement, the NRA cites to two pieces of evidence: a statement by their communications consultant, Angus McQueen, that a 60 second radio commercial in a major media market costs $850, while one in a smaller market sells for $75, McQueen Decl. ¶ 24 [NRA App. 34], and a declaration that is unidentified stating that a group called 'Campaign for America' purchased a full-page advertisement in July 1998 in the *New York Times* which cost $64,581.30, NRA App. 256-57 ¶ 12. Simply because a print advertisement is more expensive in the *New York Times* than a local radio spot in Peoria does not mean that the latter is relatively more effective. The far more useful comparison would be between an advertisement in *The New York Times*, a newspaper with nationwide circulation, and a broadcast advertisement aired on a national broadcast network. The NRA has not produced any evidence to demonstrate that when the comparison is properly restated it is more effective to communicate in print advertising. Indeed, Plaintiffs concede that it is not as effective. Mitchell Decl. ¶ 28 [6 PCS] ('When we are seeking to influence and mobilize public opinion, however, we almost always have used broadcast advertising [as opposed to newspaper advertising] because it is far more cost-effective; most people get their news and information from broadcast sources; newspaper readership is tilted toward higher-income readers, and we try to reach working and middle- class families; and broadcasts simply have a more potent effect, including the ability to generate additional 'free media' . . . . Also, newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key

part of our strategy and effectiveness.'). Accordingly, I do not find that newspaper advertising poses a comparable problem to that of broadcast advertisements detailed *supra*.

2.10.6 The primary definition of electioneering communication is narrowly tailored to only the communication media that was problematic. The evidence demonstrates that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections. This focus is neither overbroad nor underinclusive in scope as my Findings demonstrate.

2.11 *The Primary Definition of Electioneering Communication is Narrowly Tailored by Broadcast Advertisements Appearing Sixty Days Before a General Election and Thirty Days Before a Primary Election, That Name a Candidate, and Are Targeted to that Candidate's Electorate*

BCRA only applies to broadcast advertisements that refer to a federal candidate, that are targeted at the candidate's electorate, and that are broadcast within sixty days of a general election and thirty days of a primary election. By focusing on these characteristics, the primary definition of electioneering communication demonstrates narrow tailoring.

2.11.1 As an initial matter, it is important to observe that Dr. Milkis, Plaintiffs' expert, testifies that advertising aired *more* than 30 days before a primary or *more* than 60 days before an election 'can serve to frame the terms of debate.' Milkis Rebuttal Decl. ¶ 9 [RNC Vol. VII]. For example, there are examples of arrangements between political parties and candidates, whereby political parties have run advertisements for the candidates during the summer months when the candidate was low on funds, which permitted the candidate to save money to be spent on advertisements later in the election cycle. Magleby Expert Report at 47 [DEV 4-Tab 8] (noting

such arrangements between Senators Debbie Stabenow and Chuck Robb and their political parties during the 2000 election cycle). Nevertheless, even though advertisements aired outside the thirty and sixty day period can influence voters, Congress recognized that most candidate-centered issue advertisements were targeted in close proximity to a federal election. *See supra* Findings ¶¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections).

2.11.2 It is also important to note that it is unrebutted that advertisements naming federal candidates, targeted to their electorate, and aired in the period before the election, influence voters. Political consultant Raymond Strother, testifies that in his experience consulting for candidates' campaigns, all political advertisements that mention a candidate's name in the weeks leading up to an election, regardless of intent and regardless of whether express advocacy is used, influence voters. Strother Cross Exam. at 70 [JDT Vol. 32] ('I do not believe there are issue ads run immediately before an election that mentioned the candidate that aren't important in the decision- making process of the voter.'). Strother's belief is based on his view that voters assimilate and process information from a variety of different sources; creating, in his parlance, a 'big cajun stew.' *Id.* at Ex. 1 (Strother Declaration) ¶ 4. These various sources ultimately combine to help a voter make a decision. Strother elaborated on this point during cross examination:

> [P]eople, although they're interested, they're casually interested voters. Often you'll run an ad with a certain line in it, and when you poll or go into a focus group, they credit the line to your opponent. That's how casually they watch television, but it's in this climate where they don't know where they get their information. Samuel Popkin wrote a book called, *The Reasoning Voter*, and Popkin says that Americans assimilate

> information through thousands of different sources to make their opinions, and they're not sure where they came from, but it's a big stew. It's a bit of information here from a brother-in- law, a bit of information here from the barber, a bit of information here from a television ad or a radio ad, and they forget where the information came from.

Strother Cross Exam. at 34-35 [JDT Vol. 32]. This explanation is the reason that Strother concludes that advertisements run immediately prior to a candidate's election that mention the candidate ultimately have some influence on the decision-making process of the voter. *See id.* at 70; *see also* Resp. of NAB to FEC's First RFA's, No. 4 [DEV 12-Tab 7] ('NAB admits that a Political Advertisement might conceivably influence a federal election without the use of any particular words as might many other factors depending upon the circumstances of each individual race.'); *supra* Findings ¶ 2.3.2 (Bailey) ('Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign.').

Plaintiffs do not challenge Strother's conclusion with contrary testimony from other political consultants. Instead they rely on their own self-serving testimony and self-selected advertisements they claim are pure issue advertisements that would be unfairly captured by BCRA's primary definition of electioneering communication. BCRA's primary definition of electioneering communication presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria: broadcast advertisements, referring to a federal candidate, targeted to that candidate's electorate, and aired in close proximity to a federal election influence voters.

2.11.3 For example, the McConnell Plaintiffs provide this three-judge District Court with 21 advertisements aired during the 1998 and 2000 election cycles, claiming they serve as 'powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'' McConnell Br. at 61; PCS CD 8.

2.11.3.1 With regard to these allegedly 'powerful illustrations' of BCRA's overbreadth, Defendants point out that nine of the twenty-one advertisements proffered by the McConnell Plaintiffs would not have been affected by BCRA; eight were not run within 60 days of a general election or 30 days of a primary contest, and one was run in the Washington, D.C. media market where the two Senators mentioned, Senator Jesse Helms of North Carolina, and Senator Joseph Biden of Delaware, were not running for office. Gov't Opp'n at 78 & n.78 (identifying PCS CD 8 at Tracks 5, 7, 10, 12-17). Plaintiffs do not rebut these statements.

2.11.3.2 Of the advertisements that remain, four highlight past votes of the candidate, PCS CD 8 at Tracks 9 ('Stabenow Death Tax,' Def. App. C, Tab 2 at 2), 18 ('Job,' Mitchell Decl. Ex. 141 [6 PCS]), 19, 20, four urge action on upcoming votes, *id.* at Tracks 2, 3 ('Save,'[100] Mitchell Decl. Ex. 113 [6 PCS]), 6 ('Label,' Mitchell Decl. Ex. 132 [6 PCS]), 11, three criticize candidate positions on term limits, Medicare funding and a prescription drug plan, *id.* at 1, 8, 21, and one

[100] According to the AFL-CIO, 'Save' was run '[a]fter the [Taxpayer Relief Act] passed the House and was being considered in the Senate.' Mitchell Decl. ¶ 52 [PCS 6]. This advertisement was 'intended to influence House Members in the event that the bill returned for another vote in the Senate [sic].' *Id.* It was run between October 2 to October 9, 1998. *Id.*

commends the candidate's fight against trial lawyers,[101] *id.* at 4 ('Look Out For the Lawyers,' Def. App C, Tab 1 at 1).

2.11.3.3 Of this meager showing, I do not consider the four advertisements on a candidate's past votes as probative. Criticizing a candidate on past votes in the period of time immediately before a federal election with no indication of future legislation on the issue likely serves no purpose other than to affect the outcome of the election. As a result I find those four advertisements to be examples of electioneering. *See supra* Findings ¶ 2.6.7.

2.11.3.4 What the McConnell Plaintiffs are left with is *at most* eight advertisements that they claim are pure issue advertisements that would be affected by BCRA. As I have already concluded that it is very difficult, if not impossible, to discern retroactively the true intent of an issue advertisement, *see supra* Finding ¶ 2.8.5, I do not engage in a similar parsing of these advertisements. I would note that it is very likely that these eight advertisements did influence federal elections because they refer to a federal candidate in a broadcast advertisement aired in close proximity to a federal election, and targeted to the candidate's electorate. *See supra* Finding ¶ 2.11.2. Moreover, Defendants, Defendant-Intervenors, and my own Findings cast doubt on Plaintiffs' assertion that these advertisements did not serve an electioneering purpose, *see, e.g., supra* Finding ¶ 2.8.5.2 (discussing trial lawyer advertisements around the Edwards/Faircloth election). Nevertheless, the primary definition of electioneering communication focuses on objective criteria precisely to avoid trying to guess the true intent of an advertisement. For the foregoing reasons even assuming these eight advertisements were pure issue advertisements, I do not find that they demonstrate overbreadth. Simply put, eight advertisements covering a pool of at least two election cycles-including both

[101] *See supra* Finding ¶ 2.8.5.2 (discussing this advertisement).

primaries and general elections-do not serve as 'powerful illustrations' of the overbreadth of BCRA's primary definition of 'electioneering communications.' McConnell Br. at 61.

2.11.4 Defendants identify an additional 39 advertisements Plaintiffs use in their briefings as examples of genuine issue advertisements which would be unfairly affected by BCRA's provisions. Gov't Opp'n at 77-94. Plaintiffs do not rebut this figure. In addition to these advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered advertisements that would be affected by BCRA.

2.11.4.1 For twelve of these advertisements, Plaintiffs provide the Court with no specific information regarding the dates they were run except that they were aired in 1994. These twelve advertisements were sponsored by the NRA and concerned the Brady gun law and a crime bill. NRA App. 885-88 [12 PCS]; *see also* LaPierre Decl. ¶ 21 [11 PCS] (stating only that the crime bill commercials were run in 1994). Without any information as to their airing dates, I am unable to reach any conclusion about them and therefore do not consider them. Thirteen other commercials, also sponsored by the NRA, would escape BCRA's effects because they were run in 2000 and referred only to President Clinton who was not a candidate for office at that time. NRA App. 914-16 [12 PCS]. Accordingly, I exclude from consideration these thirteen advertisements as well.

2.11.4.2 Another advertisement, sponsored by the ACLU, I exclude from consideration because it was clearly designed simply to provide the corporation standing to challenge BCRA. The ACLU cites, as an example, an advertising campaign directed at Speaker Dennis Hastert, who represents the fourteenth district of Illinois, run in March of 2002, urging him to bring the Employment Non-Discrimination Act

(ENDA) to a full vote in the House. Murphy[102] Decl. ¶ 10 [3 PCS]; *see also* Text of advertisements, 3 PCS/ACLU 14-17. The advertisement was broadcast on multiple Chicago and Aurora, Illinois radio stations throughout the weekend of March 15-March 17, 2002. *Id.* Since the advertisement was run within thirty days of a primary election, the commercial would have constituted an electioneering communication under BCRA and would have violated BCRA because it was paid for with the general treasury funds of a corporation. *Id.* (observing that the 'ACLU also hoped to highlight the constitutional flaws of BCRA'). An internal ACLU document demonstrates that the ACLU's purpose in running the advertisement was to create a commercial that would violate BCRA. A March 10, 2002, e-mail from Laura Murphy, legislative director of the ACLU, to her colleagues, explained why the ACLU's March 2002 Hastert ad was run:

> Anthony wants the ACLU to be in a position to challenge Shays-Meehan when it becomes law as early as during the Easter recess. As you know the issue advocacy restrictions would select groups like the ACLU if we want to take out and [sic] ad 30 days before a primary or 60 days before a general election in broadcast, satellite or cable outlets. These ads would have to reach 50,000 people or more and would have to mention the name of a candidate. *Steve thinks that the ads that we ran during the 2000 election cycle would not qualify to give us clear standing to challenge the law.*
>
> Anthony wants us to run these ads and he has said that he has 501(c) 4 money to do them! I have a chart in my office, but I can also fax one to you from New York tomorrow 3-1-02, that show all of the primary dates around the country. When You [sic] get that, I need you

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[102] Laura W. Murphy has served as the ACLU's legislative director since 1993. Murphy Decl. ¶ 1 [3 PCS].

to look at the states where there are primaries and see if *you can find a candidate whom we could target for an issue ad.* For example it is too soon to do an ad by Tuesday, but Tuesday, March 12 is the Texas primary and we could decide that Chet Edwards is on the fence about something and run an ad that says, 'Call Chet Edwards and ask him to support xyz.' Anthony said that he has money to pay for such an ad. Or we could target a Senator on election reform. Remember it does not have to be TV, as the broadcast restriction in Shays-Meehan covers radio as well. We would like to run these ads before the bill becomes law. WHICH ONLY GIVES US ABOUT TWO WEEKS TO PULL THIS TOGETHER!!

Phil, I know you have been busy with the web crisis (which you did not tell me about), so you are probably crazed. But I was hoping that Greg could take the lead on finding the issue that will still be important in tow [sic] weeks where we can target a member and it will make sense. I think that the issue we pick should be a priority so that we do not waste 501(c)(4) money on something we are not really concerned about.

Email Message Attached as Ex. to Resps. of American Civil Liberties Union to Defendant's Second Set of Requests for Production of Documents, Ex. B; USA- ACLU-00003 [DEV 130-Tab 4] (italics added). Defense experts Krasno and Sorauf comment on the ACLU's Hastert advertisement:

> In short, BCRA is remarkably successful in differentiating between the vast majority of pure issue ads and candidate-oriented issue ads.
>
> Nevertheless, the ACLU has demonstrated with a commercial about gay rights, aired in House Speaker Dennis Hastert's district last spring before the GOP primary, that it is possible to deliberately create a pure issue ad that runs afoul of BCRA. This episode deserves special scrutiny, and we would emphasize several points. It is telling, from our perspective as students of elections and campaigns, that the ACLU was forced to fabricate its own example of a pure issue ad that would be improperly categorized by BCRA. Given the huge numbers of issue ads broadcast in 1998 and 2000, if plaintiffs are correct in their dire predications about how BCRA would damage free speech rights, it should have been easy to find numerous real-life examples to illustrate the same point. In fact, very few pure issue ads would have been affected by BCRA. Even more telling, however, the ad that the ACLU ran was designed in a specific way to trigger BCRA. It need not have done so.

Krasno and Sorauf Report at 62-63 [DEV 1-Tab 2]; *see also* Text of ads, 3 PCS/ACLU 16-17 (noting script of advertisement that the ACLU ran in the print media over this issue). Given this information surrounding the background of the ACLU advertisement, I exclude it from consideration.

2.11.4.3 Another advertisement run by the AFL-CIO, titled 'Sky,' criticized Members of Congress for a past vote. Mitchell Decl. Ex. 139 ('Sky'); *see also id.* ¶ 59 (failing to note whether there was any upcoming legislation related to the past votes that the advertisement might have been targeting). Similar to my conclusion above, I do not consider this advertisement because I find it to be electioneering.

2.11.4.4 Of the remaining twelve advertisements, four commercials are discussed in detail in other paragraphs of my Findings or the appendix to my opinion. *See* Findings ¶¶ 2.6.6.2 (ABC advertisement concerning penalties for child molesters), App. ¶ I.D.7.i, I.D.8.c (Anti-abortion commercial identifying Senators Kohl and Feingold); Findings ¶ 2.11.8.2 ('Deny' and 'Barker'). Another advertisement run by CBM was aired in response to commercials aired by the AFL-CIO to 'correct the issue debate and counter the distortions in the ads that we just saw.' Ryan Dep. at 74-75. Of the remaining

seven advertisements, four are NRA-sponsored 30-minute 'news magazines' (titled 'California,' 'It Can't Happen Here,'[103] 'Million Mom March,' and 'Tribute'[104]), NRA Reply at 22-24, one was run by the Southeastern Legal Foundation,[105] 60-Plus Association, the Center for Individual Freedom, and the National Right to Work Committee, praising Senator McConnell's stance on campaign finance reform, McConnell Br. at 63, one was sponsored by the National Right to Life Committee and criticized Senator McCain's position on campaign finance reform, O'Steen Cross Exam. at 52, and one was a Chamber of Commerce-sponsored commercial aired in Utah which pointed out that a candidate had not taken a position on two competing drug prescription plans, Chamber/NAM Br. at 5.[106]

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[103] 'California' and 'It Can't Happen Here' are discussed in greater detail *supra*, App. ¶ I.D.8.h.

[104] 'Tribute' includes the following statement delivered by Charlton Heston:

> The NRA is baaaaaaack. [Much applause] All of this spells very serious trouble for a man named Gore. [Applause]. That leads me to that one mission that is left undone—winning in November. . . . So, as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. Gore. 'From my cold dead hands.' [Much Applause].

NRA App. at 947 (emphasis in the original). The NRA states that this passage 'simply reflect[s] the NRA's practice of soliciting members by mentioning anti-gun politicians.' NRA Reply at 24.

[105] The Southeastern Legal Foundation is a 501(c)(3) organization, McConnell Second Amend. Compl. ¶ 36, which is exempt from BCRA's restrictions on electioneering communication. Final Rule, Electioneering Communications, 67 Fed. Reg. 65,190, 65,199-200 (Oct. 23, 2002) (to be codified at 11 C.F.R. 100.29(c)(6)).

[106] Defendants dispute the argument that this advertisement did not have an electioneering purpose based on the context in which the advertisement was run. Gov't Opp'n at 85-86. Defendants note the

2.11.4.5 I have been able to find an additional four advertisements that were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. (AFL-CIO's 'No Two Way,' 'Spearmint,' 'Spear,' and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials.

2.11.4.6 Given my finding that it is very difficult to determine the objective behind the advertisement without a thoroughgoing contextual analysis of the advertisement, *see supra* Finding ¶ 2.8.5, I do not attempt to parse these remaining sixteen advertisements to determine if their true purpose was to affect an election. I make this statement even though I recognize that these advertisements likely did influence the election by virtue of referring to a federal candidate, in close proximity to a federal election, and targeted to the candidate's electorate, *see supra* Finding ¶ 2.11.2, and even though Defendants, Defendant-Intervenors, and my own Findings demonstrate that some of these advertisements were likely electioneering, *See, e.g., supra* Finding ¶ 2.6.6.2 (discussing ABC's advertisement on a candidate's record on child molestation legislation). Rather, I simply conclude that the evidence of these advertisements cited in Plaintiffs briefing is not sufficient to render BCRA overbroad. If Plaintiffs were correct, that BCRA would have such an indelible effect on their ability to advertise about issues of importance to their organization, I would have

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commercial was run only between November 1 and 6, 2000, when Congress was not in session. *Id.* at 85. The race was labeled a 'toss-up' by the Cook Report, and the advertisement's 'tag line—'Tell Matheson to make a decision. This issue is too important to ignore.'—played to the overall campaign theme that voters should elect someone who is decisive and who shares their values.' *Id.* The Chamber does not respond to these observations.

expected a more robust showing; particularlywhen the examples they submitted are from as far back as 1996 and include advertisements aired in close proximity to both primary *and* general elections. As a result of all these considerations, I conclude that these remaining sixteen advertisements do not demonstrate BCRA's overbreadth; even if taken in conjunction with the eight advertisements raised by the McConnell Plaintiffs and discussed *supra*.

2.11.5 The AFL-CIO Plaintiffs have adopted a similar tactic as the McConnell Plaintiffs in regard to primary elections and attempt through a series of examples to show that BCRA's thirty day window is overbroad. The AFL-CIO Plaintiffs have put forth a number of advertisements which they claim are 'genuine issue advertisements' relating to pending legislation that BCRA would capture because they ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). Instead of discussing these at length in my Findings, I have analyzed them in my Appendix. *See* App. ¶¶ II.A.[107]

2.11.5.1 These AFL-CIO examples constitute 336 cookie-cutter advertisements selected from a pool of at least three different election cycles. Of this number, I determine that only 50 of these advertisements would have been arguably affected by BCRA. *Id.* ¶ II.A.10. While I have some doubt that all of these fifty remaining advertisements were designed purely to influence the pending legislative debate and not a primary election outcome, given my finding that discerning

[107] The AFL-CIO Plaintiffs also cite to a handful of advertisements that they claim are pure issue advertisements that would appear within the sixty-day period. I have already discussed these in my findings on the McConnell Plaintiffs' twenty-one advertisements, in the context of the thirty-nine advertisements spotted by Defendants and Defendant-Intervenors in their briefing, and with regard to the four additional advertisements that I found reviewing Plaintiffs' submissions.

the true intent behind an advertisement is nearly impossible without a fulsome understanding of the context in which the advertisement ran, *see supra* Finding ¶ 2.8.5, I do not attempt to make that judgment with these advertisements even though they likely had that effect given their content and timing. *See supra* Finding ¶ 2.11.2. Given these factors and the fact that at best the AFL-CIO Plaintiffs were only able to find fifty advertisements that would be affected by BCRA out of federal primary elections covering at least three election cycles, I conclude that the AFL-CIO Plaintiffs have not shown that BCRA's thirty day period is overbroad. Moreover, the record contains other evidence that demonstrates that the thirty day primary window is narrowly tailored.

2.11.5.2 Defendants' experts comment that the

> hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period.

Krasno and Sorauf Expert Report at 61 [DEV 1-Tab 2].

2.11.5.3 The experts' thesis is substantiated by empirical evidence regarding the thirty day period. Defendant Intervenors are the only party that conducted a study of the data to determine the impact of BCRA on advertisements run during the 2000 primary election period. Def. Int. Reply at 59. They found 76 distinct advertisements, which aired more than 60 days before the election from the CMAG database, comprising 16,916 airings. *Id.* at 59 & n.201. Of these advertisements, three percent of the airings (522 out of 16,916) named a candidate and were aired within 30 days of

the candidate's primary. *Id.* at 59 & n.202. Examining the student codings, the Defendant Intervenors found the majority of the advertisements had been deemed 'electioneering,' resulting in a finding that of the advertisements identifying a candidate and airing within 30 days of a 2000 primary election, 1.2 percent were 'genuine issue advertisements.' *Id.* at 59. As none of the other parties submitted any study dismissing these results or objecting to Defendant-Intervenors' study, I accept the conclusions reached therein. As I have already found that candidate- centered issue advertisements are used to influence primary elections, *see* Findings ¶¶ 2.6.5.5, 2.10.2 (Pennington), 2.6.6.5 (New Hampshire Presidential primary advertisement referencing Senator McCain), I conclude that on the basis of my Findings relating to the AFL-CIO advertisements, Defense experts Krasno & Sorauf's results, and Defendant-Intervenors' analysis, BCRA's thirty day window is narrowly tailored.

2.11.6 As discussed in this section, Plaintiffs have focused on examining the intent behind their advertisements to demonstrate BCRA's purported overbreadth. However, Plaintiffs have not been able to provide any evidence to support this position that is not either self-serving testimony or evidence rebutted by contrary evidence.

2.11.7 There is a disputed issue of fact about whether advertisements that name a federal candidate, are aired in that candidate's electorate, and broadcast in close proximity to the candidate's election are ever pure issue advertisements. Given this disputed issue, I cannot agree with Plaintiffs that the primary definition of electioneering communication is overbroad.

2.11.7.1 Political consultants testify that there is minimal utility in running a genuine issue advertisement in the 60 days before a federal election. As a result, issue advertisements run in that time frame are most likely designed to influence the outcome of a federal election. Pennington Decl. ¶ 10 [DEV 8-

Tab 31] ('Parties and interest groups would not spend hundreds of thousands of dollars to run these [soft money] ads 15 days before an election if they were not trying to affect the result. These candidate-specific ads are not usually run the year before the election or the week after.'); Lamson Decl. ¶ 6 [DEV 7-Tab 26] ('These 'issue ads' generally stop on the day of the election.'); Strother Decl. ¶ 7 [DEV 9-Tab 40] ('[T]hese issue advertisements were run when there were no pending elections. For these true issue ads, we specifically avoided the months right before the election because (a) air time would be more expensive; and (b) each ad would just become part of the election season gumbo and viewers would assume that it was just another election-related ad.'); Strother Cross Exam. at 70-71 [JDT Vol. 32]; Bailey Decl. ¶ 12 [DEV 6-Tab 2]. Plaintiffs have provided no contrary political consultant testimony to rebut these conclusions.

2.11.7.2 Defense expert testimony confirms the political consultants' view that it is impractical to run genuine issue advertisements in the weeks leading up to an election, unless you are aiming to influence a federal election. Dr. Goldstein states:

> One concern sometimes raised by those opposed to the BCRA regulations is that the restriction may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics. There is no reason to believe that BCRA would significantly hinder interest groups from effectively getting out their messages on public policy issues. Running genuine issue ads near an election does not increase the effectiveness of those ads; in fact, it is likely that the ads' effectiveness actually decreases. . . .
>
> In addition to being less effective at conveying their messages, issue ads run close to an election are also less cost-effective, since the price of scarce television and

radio air time is higher near an election than during the rest of the year.

Goldstein Expert Report at 32-33 [DEV 3-Tab 7]; *see also infra* App. ¶ I.C.8; Magleby Expert Report at 20 [DEV 4-Tab 8] ('In contrast, genuine issue ads are more likely to run earlier since rates are cheaper and proximity to an election is less important.'); Krasno and Sorauf Expert Report at 57 [DEV 1-Tab 2] ('Pure issue ads are more likely to respond to the congressional calendar or an advertising strategy unrelated to an election.').

2.11.7.3 Plaintiffs' experts dispute the Defense experts' position and contend that it is effective and necessary for corporations and labor unions to spend general treasury funds on broadcast advertisements in the weeks before an election that mention the name of a federal candidate and are targeted to the candidate's electorate. Monroe Decl. ¶¶ 18-19 [10 PCS] ('The defendants in this proceeding have argued that ads run near the time of an election are evidence that the association's actual intent is to advocate the election of one candidate or another. However, there are other, more valid, explanations for the timing of our advertising. One is that serious legislative initiatives or regulatory proposals often are considered near the time of elections. Also, it is clear that members of the public are generally more receptive to and engaged in considering government policy ideas and issues as elections near. If that is the time when people will listen, that is the time to speak. And once an election occurs, there seems to be a period of fatigue during which political matters are of less interest, making issue ads then less effective.'); Huard Decl. ¶ 10 [10 PCS] ('NAM has run issue ads at times when no election was impending. In broad terms, however, Americans tend to have greater interest in political matters as an election approaches. At the same time, elected officials are most attuned to the views of their constituents in the pre-election period. Thus, for many purposes, the pre-election

season is a critical time for issue ads. Conversely, after an election public interest in public policy matters fades, perhaps due to fatigue. Then, few issue ads are run soon after an election.'); Murphy Decl. ¶ 12 [3 PCS] ('Finally, it is important to emphasize that the blackout periods imposed by the BCRA-60 days before a general election and 30 days before a primary-are often periods of intense legislative activity. During election years, the candidates stake out positions on virtually all of the controversial issues of the day. Much of this debate occurs against the backdrop of pending legislative action or executive branch initiatives. Some of the President's or Attorney General's boldest initiatives are advanced during election years-often within 60 days of a general election. This year, for instance, legislation creating a new federal department of Homeland Security is under consideration during this pre-election period.'); *but see supra* Finding ¶ 2.11.4.2 (only example of a pure issue advertisement created by ACLU that would be effected by BCRA was intentionally created to violate BCRA in order to provide ACLU with standing to challenge law).

2.11.7.4 Plaintiffs' expert Dr. Gibson agrees that running issue advertisements in proximity to federal elections is effective; however, he does not respond to Defendants' expert's view that commercials aired close to an election are more expensive, or the fact that genuine issue advertisements tend to air in conjunction with the legislative calendar as opposed to the federal election cycle. *See infra* App. ¶ I.C.8.

2.11.8 On the basis of this dispute and my earlier Findings, I disagree with Plaintiffs' claim that the legislative calendar can necessitate the running of issue advertisements during the final days of an election campaign that refer to a federal candidate and are targeted to the candidate's electorate.

2.11.8.1 Many deponents merely state that 'serious legislative initiatives or regulatory proposals often are considered near the time of elections,' without providing

actual examples of advertisements run in response to the legislative activity. Monroe Decl. ¶ 18 [10 PCS]; *see also* Huard Decl. ¶ 11 [10 PCS] ('[I] ssue ads supporting a particular tax bill may well be needed as the bill approaches a vote. If it happens that primaries or elections are imminent, that does not diminish the need to be ableto speak out right then.'); Murphy Decl. ¶ 12 [3 PCS] (commenting that 'the blackout periods imposed by the BCRA . . . are often periods of intense legislative activity,' noting consideration of the Homeland Security Department bill occurred within 60 days of the 2002 election, but listing political activities conducted that would not have been affected by BCRA). This evidence is so general that, even if I were to consider Plaintiffs' point valid, I would find that it was not probative.

2.11.8.2 While two other organizations provide examples of advertisements run about legislative issues that were actually pending before the legislature, this testimony does not demonstrate that the primary definition of electioneering communication is overbroad. Other than the AFL-CIO and the Gun Owners of America ('GOA'), no other groups examples were provided of advertisements run in the 60 days prior to an election or 30 days prior to a primary directly addressing pending legislative activity. The examples from the AFL-CIO included advertisements regarding an 'upcoming budget fight over education programs' in September 1996. Mitchell Decl. ¶ 41 & Ex. 59 [6 PCS] ('No Two Way').[108] The labor group also ran commercials between

[108] The FEC's investigation of the AFL-CIO's 1996 political advertisement concluded that

> [i]n the nine flights broadcast between late June and mid-September, 1996, the advertisements would criticize the incumbent member of Congress named therein, frequently in harsh terms, about his or her record on the issue that was the subject of the advertisement. However, with the exception of a flight of advertisements on the topic of the minimum wage that aired in late June and early July, 1996, there was no clear connection between the content of the advertisements and any legislation that was then the subject of intensive legislative action at the time of the advertisements.

General Counsel's Report, MUR 4291 (Jun. 9, 2000) at 5-6 [DEV 52-Tab 3]. The AFL-CIO responds, stating that 'No Two Way' was 'broadcast in order to influence the 'upcoming budget fight on education programs' and referred to related past votes to make its point.' AFL-CIO Reply at 4 n.3 (quoting Mitchell Decl. ¶ 41 [6 PCS]).

September 21 and 25, 1998, in eight congressional districts, opposing 'fast track' trade legislation, which was scheduled for a vote in the House of Representatives on September 25, 1998. Mitchell Decl. ¶ 52 & Ex. 116 [6 PCS] ('Barker'). During the same month, the AFL-CIO also ran a 'flight of broadcasts' aimed at a scheduled Senate vote on HMO legislation that the AFL-CIO considered to be inadequate, *id.* ¶ 51 & Exs. 105-07 ('Deny'), and opposing the Taxpayer Relief Act which had been recently marked up by the House Ways and Means Committee, *id.* ¶ 52 & Exs. 108-09 ('Spearmint' and 'Spear'); G. Shea Decl. ¶ 43 [7 PCS]. In 2002, the GOA ran a radio advertisement in New Hampshire within 30 days of the primary election for the New Hampshire Republican U.S. Senatorial nominee, which supported legislation allowing airline pilots to be armed. Declaration of Lawrence D. Pratt ¶ 5.

2.11.8.3 As I have stated throughout, it is nearly impossible to determine retroactively the objective behind an issue advertisement, see supra Finding ¶ 2.8.5, and consequently, I do not attempt to engage in an analysis of the true intent behind these advertisements, even though it is highly likely that these advertisements influenced the election on the basis of their content and timing, *see supra* Finding ¶ 2.11.2. Rather, I conclude that this minimal showing from the AFL-CIO and GOA does not provide a basis for concluding that the primary definition of electioneering communication is overbroad.

2.12 *Expert Reports on BCRA's Effect on Political Advertising*

Plaintiffs have not produced any studies of their own analyzing BCRA's purported effect on pure issue advertising. Instead, as discussed above, Plaintiffs prefer to rely on picking out advertisements they claim are pure issue advertisements affected by BCRA and criticizing studies relied on by Congress during their deliberations that Defendants have produced for the litigation. In my Appendix, I describe the various expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring BCRA has achieved to avoid affecting federal non-electioneering advertisements. *See infra* Appendix. My Appendix examines the criticism of these studies. *id.* Overall, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiff's expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies.

2.12.1 At the outset, it is clear that the data underling a majority of the studies, provided by CMAG, is not without its limitations. App. ¶ I.A. I am aware that CMAG's coverage is not universal, that advertisements can be, and apparently are missed, and that some information may not be present on the four-second snapshot storyboards. *Id.* ¶ I.A.3. The most notable deficiency in the data appears to be its inability to identify different 'cookie cutter' advertisements (advertisements identical except for mentioning different candidates). *Id.* Despite pointing out these gaps, Dr. Gibson has not demonstrated how these shortcomings affect a majority of the conclusions that can be drawn from the CMAG data. *Id.* ¶ I.A.4. Furthermore, Plaintiffs have failed to demonstrate that the efforts taken by experts to remedy the 'cookie cutter' effect for their studies were deficient. *Id.* In addition, no evidence has been presented that the data is biased in one way or the other based on the fact that CMAG

does not cover 20 percent of American households or local cable channels. *Id.* Dr. Gibson's hypothesis that the CMAG is more likely to miss 'genuine issue advertisements' is pure conjecture, and contradicted by Dr. Goldstein's testimony regarding the overinclusive nature of the advertisements provided to CMAG by CMR. *Id.* ¶ I.A.3. Finally, the evidence shows that CMAG is used as the basis for many political science studies which are peer-reviewed and published by the top political science journals in the country, and is a regular resource for politicians and political parties. *Id.* ¶ I.A.5. Given the widespread acceptance of CMAG in academic and political circles, and the fact that Plaintiffs were unable to demonstrate that its flaws result in bias, I accept the CMAG data as a legitimate source of data for use in studies seeking to understand the contours of political advertising, recognizing it has certain limitations.

2.12.2 The Annenberg studies, discussed in Findings ¶¶ 2.2.1, 2.2.2, 2.2.3, 2.2.4, 2.2.6 (conclusions), 2.8.2.1, *supra*, as far as I can discern, have not been challenged by anyone. In fact, as mentioned above, the record shows that Members of Congress, Defendants' experts, and even Plaintiffs' experts rely on the Annenberg Reports, and as such I find no reason not to accept their conclusions as well. *See* Findings ¶ 2.2.6 (Annenberg Center concluding *inter alia* that '[i]nstead of creating the number of voices *Buckley v. Valeo* had hoped, issue advocacy allowed groups such as the parties, business and labor to gain a louder voice' and that the 'distinction between issue advocacy and express advocacy is a fiction').

2.12.3 Dr. Goldstein provides an expert report based on his own findings derived from his own version of the CMAG data from the 2000 election, which he had updated since providing it to the *Buying Time 2000* authors. App. ¶ I.C. Unrebutted are his findings that: interest group advertising in 2000 was concentrated in so-called 'battleground' states; roughly 11 percent of candidate-sponsored advertisements in

2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in 'battleground states.' *Id.* Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of 'electioneering communication' narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering. I accept these uncontroverted findings.

2.12.4 Plaintiffs have attempted to discredit the *Buying Time* reports specifically through the expert reports of Dr. Gibson. Dr. Gibson presents various criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. The effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. Although some of these 'hits' have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contradictory results from such a study would have been far more persuasive than the recalculations of incorrect versions of the *Buying Time* data sets and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

2.12.5 In terms of the *Buying Time* reports in general, I would not discount the studies because they were approached with a particular result in mind. The testimony shows that policy perspectives and effective scientific research are not mutually exclusive. App. ¶ I.D.7.b. The 'cleaning' of the data that Dr. Gibson finds suspicious appears, from the testimony, to be a necessary function for databases of the size produced

for the *Buying Time* reports and not the function of bias. *Id.* ¶ I.D.7.n. Fixing miscodings and resolving the 'cookie cutter' issues required such actions. *Id.* The confusion among the experts as to the correct database to use to analyze the studies' findings, *see id.* ¶ I.D.7.d, decreases the utility of Dr. Gibson's Expert Report, but also undermines the notion that the *Buying Time* authors manipulated the data in order to achieve their desired results. The fact that the Brennan Center maintained previous versions of the *Buying Time* data sets suggests that their changes were not part of an effort to introduce bias into the data set.

2.12.6 I also do not take issue with the studies' designers seeking to determine the mental perceptions of ordinary viewers. Studies based on subjective opinions are an accepted practice in the social sciences. *Id.* ¶ I.D.7.i. The evidence also demonstrates that although university students are not necessarily representative of society as a whole, relying on student impressions as the basis for academic conclusions is an accepted scholarly practice. *Id.* ¶ I.D.7.h.

2.12.7 Much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the findings in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements, which identify candidates, are concentrated toward the end of the election campaign. *Id.* ¶ I.D.7.a. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that '[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.'). Furthermore, some of these results are supported by those of the unrebutted Annenberg Report 2001. *See id.* ¶ I.B.1.

2.12.8 However, I am troubled by the fact that coders in both studies were asked questions regarding their own

perceptions of the advertisements' purposes, and that these perceptions were later recoded. *See, e..g., id.* ¶ I.D.8.c. When such changes are made, it is difficult to determine their effect on the findings in the reports. The principal casualty in this regard are the conclusions the *Buying Time* studies make regarding the percentage of'genuine' issue advertisements 'captured' by BCRA. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the election, 14.7 percent were 'genuine' issue advertisements. *Id.* ¶ I.D.6.a, I.D.7.r.(2). Dr. Gibson found figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* ¶ I.D.7.r.(3). *Buying Time 2000* finds that 0.6 percent of the advertisements aired in the final sixty days of the 2000 campaign which identified a candidate were 'genuine' issue advertisements. *Id.* ¶ I.D.6.b. The results from both *Buying Time* studies are based on coders' answers to the questions asking for their opinions on the commercials' purpose. *Id.* ¶ I.D.4.

2.12.9 For *Buying Time 1998*, it is clear that a small number of advertisements disputed in this litigation, which aired a considerable number of times, were coded as 'genuine' issue advertisements, but that the coders continued to fill out the survey sheets as if they had found the advertisements to be 'electioneering' commercials. *Id.* ¶ I.D.7.r.(3). This fact undermines Dr. Gibson's, Dr. Krasno's, and *Buying Time 1998*'s conclusions about the impact BCRA would have had on genuine issue advertisements over the course of 1998 or within the final 60 days of the election. I cannot determine based on the record which view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on this particular point.

2.12.10 *Buying Time 2000* suffers from a similar infirmity, although the reasons for the changes appear to be more the result of the authors' perceptions than on coding irregularities, *id.* ¶ I.D.8.c, and for that reason, I cannot accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements, *id.* ¶ I.D.6.b. However, Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most 'conservative' calculation of advertisements aired in the final 60 days of the 2000 election also identifying a candidate, which were 'genuine,' is 17 percent. *Id.* ¶ I.D.8.c. This figure is not rebutted by Plaintiffs or their expert.

2.12.11 Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. App. ¶¶ I.D.7.p, I.D.8.e. I reject this argument. As Defendants' experts have clearly demonstrated, the fact that an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id.* ¶ I.D.7.p. Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id.* (Lupia observes that many beer commercials do not focus on the product, but rather people 'engaged in a range of activities that we can call 'wild nights out.'' Accordingly, it is not unreasonable to 'perceive that the purpose of the ad is to get' the viewer to buy the beer, 'but to judge its primary focus as wild times.') Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a person running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters as a means of conveying a candidate's values and not directly on the personal characteristics of the candidates. *Id.* ¶ I.D.7.p;

see also supra ¶ 2.3.2 (Bailey) (Over time, a campaign defines a candidate through a combination of style, image, and issues. Even shortly after watching an ad, the target audience usually doesn't remember the ad's substantive details. Rather, the viewers just get a feel for the candidate. It takes a lot of these 'feels' to make up a campaign.').

2.12.12 In any event, I view these calculations as largely an academic exercise. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial. *Id.* ¶ I.D.7.i, I.D.8.c. Determining the purpose of an advertisement is a subjective enterprise, and that appears to be why BCRA's framers have used objective criteria to define 'electioneering communication.' Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id.* ¶ I.D.7.r.(4).

2.12.13 I also address Dr. Gibson's assertion that 30,108,857 group-citizen genuine issue communications would have been affected by BCRA. App. ¶ I.D.7.q. Dr. Gibson applied gross rating point data to 707 of the 713 genuine issue advertisement airings Krasno and Sorauf found would be captured by BCRA to reach this figure. *Id.* Defendants have not responded to Dr. Gibson's calculation, in part because Dr. Gibson raises it for the first time in his rebuttal expert report. *Id.* Although 30 million group-citizen communications is certainly an impressive figure on its face, a closer inspection reveals that the figure is not as oppressive as it sounds.

2.12.13.1 First, these thirty million communications are airings of three distinct advertisements aired 707 times. Therefore, these 30 million communications actually

represent only three messages transmitted during programs whose aggregate viewership constitutes 30 million households. As Dr. Gibson has not provided a citation to the source of the gross rating point data he used, I cannot verify his figures. However, it is clear that one advertisement, 'HMO said no' represents the majority of the 707 airings, having been broadcast 118 times in Greensboro, 126 times in Raleigh-Durham, and 211 in St. Louis (I cannot determine where the other two advertisements, 'CENT/Breaux' and 'CCS/No Matter What' were aired). *Id.* ¶ I.D.7.r.(2) n.201. The data shows that even if 'HMO said no' had reached every household in Greensboro, Raleigh- Durham, and St. Louis with a television, the number of households receiving the message would be 2,529,450. *Id.* Given this calculation, and the lack of direction provided by the experts in this case, it appears that while 30 million genuine issue *communications* would have been affected by BCRA, the actual number of *households* affected is much lower, although not necessarily insignificant, because many of the 30 million households obviously received the group-citizen communications numerous times.

2.12.13.2 Second, Dr. Gibson provides no context for his 30 million communications figure. He does not discuss whether or not these 707 airings were received by a greater or lesser percentage of households than the other 4140 airings which were run within 60 days of the 1998 election and identified a candidate. If one takes the average number of households that received a single airing of one of the three genuine advertisements in 1998, 42,586 (30,108,857/707), and multiplies it by the total airings of commercials mentioning a candidate and run within 60 days of the election, the result is 206,414,342 group-citizen issue communications (42,586 *4847). This figure, admittedly not precise, demonstrates that the amount of group-citizen genuine issue communications (Dr. Gibson's 30 million figure) is likely a small proportion of the total amount of

group-citizen issue communications captured by BCRA's 'electioneering communication' definition (represented by the 206 million communications figure above). In fact, this exercise is merely an amplification of the Krasno and Sorauf analysis and results in the same 14 percent figure that Drs. Krasno and Sorauf determined represents the amount of genuine issue advocacy that would be captured by BCRA. App. ¶ I.D.7.r.(2). Again, Dr. Gibson's 30 million communications figure could constitute a greater or lesser percentage of the universe of communications mentioning a candidate and airing within 60 days of the 1998 election, but I am given no basis for making such a determination.

2.12.13.3 Therefore, although I do not reject Dr. Gibson's calculation, I find that the record does not provide me with a sufficient basis for assessing its significance and therefore its utility for determining whether BCRA is overbroad is minimal at best.

2.13 *Conclusion*

Based on the extensive evidence presented in the record, it is entirely possible to distinguish pure issue advocacy from candidate-centered issue advocacy without relying on the listener/viewer attempting to discern the 'true' intent of the advertisement. These empirical determinants form the basis of the primary definition's objective test: issue advertisements that mention a federal candidate, are broadcast on radio or television, are aired in the candidate's electorate, and are aired in close proximity to a federal election. While there may be advertisements sharing these characteristics that are not intended to influence an election, the record demonstrates that as an objective matter advertisements sharing these characteristics influence the outcome of federal elections. When corporations and labor unions pay for these advertisements with general treasury funds, they are in violation of longstanding federal policy.

TITLE III: MISCELLANEOUS

3.1 The Federal Election Commission has recommended that Congress take measures to prevent contributors from using their minor children as a method of circumventing campaign finance laws. FEC Annual Report 1992 at 69 (recommending that Congress 'establish a minimum age for contributors' due to the FEC's finding that 'contributions are sometimes given by parents in their children's names') [DEV 14-Tab 1]; FEC Annual Report 1993 at 50 (recommending that Congress adopt a 'presumption that contributors below age 16 are not making contributions on their own behalf' due to the FEC's finding that 'contributions are sometimes given by parents in their children's names' and noting that 'Congress should address this potential abuse by establishing a minimum age for contributors, or otherwise provide guidelines ensuring that parents are not making contributions in the name of another') [DEV 14-Tab 2]; FEC Annual Report 1994 at 56 (same) [DEV 14-Tab 3]; FEC Annual Report 1995 at 56 (same) [DEV 14- Tab 4];FEC Annual Report 1996 at 55-56 (same) [DEV 14-Tab 5]; FEC Annual Report 1997 at 54 (same) [DEV 15-Tab 6]; FEC Annual Report 1998 at 44 (same) [DEV 15-Tab 7]; FEC Annual Report 1999 at 50 (same) [DEV 15-Tab 8]; FEC Annual Report 2000 at 43 (same) [DEV 15-Tab 9].

3.2 The Thompson Committee Majority Report recommended precluding 'those ineligible to vote ... from making contributions to candidates for federal office.' Thompson Comm. Report at 4506. The majority found 'substantial evidence that minors are being used by their parents, or others, to circumvent the limits imposed on contributors.' *Id.*

3.3 Senator Christopher Dodd stated on the Senate floor: 'Normally when we go out and solicit campaign contributions we do not limit it to the individual. We also want to know whether or not their spouse or their minor or adult children would like to make some campaign contributions. As long as

such contributions are voluntary, then those individuals may contribute their own limit . . . .'' 147 Cong. Rec. S2933 (daily ed. Mar. 27 2001) (Sen. Christopher Dodd).

3.4 Senator McConnell testifies that he 'occasionally' asks donors who have given the maximum level of federal money to his campaign if they have family members who would be willing to contribute to the campaign as well. McConnell Dep. at 99-100 [JDT 19]. He also states that 'occasionally' donors send checks on behalf of their children. *Id.* at 132.

3.5 The evidence shows that at least four investigations into contributions made by minors were initiated in response to press articles. *See* Pre-MUR 318, 00890-933 [DEV 43-Tab 4]; *see also* FEC MUR 4254, FEC 119-0016 [DEV 43-Tab 4] (letter from a father under investigation to the FEC stating that the FEC's investigation relied on a newspaper article).

3.6 Defendants cite to 14 newspaper articles which discuss contributions by minors. *See* Alan C. Miller, Minor Loophole, L.A. Times, Feb. 28, 1999, reprinted in 148 Cong. Rec. S2146-S2148 (2002); David Mastio, The Kiddie-Cash Caper: Gifts from minors are the next big campaign loophole, Slate, May 21, 1997, INT013275-INT013280 [DEV 134-Tab 3]; Rise in student gifts begs question: Was law broken?, USA Today, May 20, 1997, at 12A, FEC101-0001 [DEV 134-Tab 3]; Chris Harvey, The Young and the Generous: Md. Children Give to Campaigns, Wash. Post, Nov. 20, 1995, at B01, FEC137-0009-0011 [DEV 134-Tab 3]; Alex Knott, Members Cash In on Kid Contributions, Roll Call, June 5, 1995, at A-1, reprinted in 148 Cong. Rec. S2146 (2002); Jerry Landauer, Kiddies Go Krazy Over Carter, Break Open Piggy Banks, Wall St. J., July 8, 1976, at 1, 27, FEC137- 0008 [DEV 134-Tab 3]; John Kruger, Youths 2-17 follow parents' lead in political contributions, The Hill, Nov. 27, 1999, INT013287 [DEV 42-Tab 2], at 1, 53; Michelle Malkin, Kiddie-case collections open fund-raising loophole, Seattle Times, May 27, 1997, INT013272-INT013274 [DEV 42-Tab

2]; Kid Stuff, Roll Call, June 15, 1995, INT013262 [DEV 42-Tab 2]; Youthful Donors, Political Finance and Lobby Reporter, June 14, 1995 [DEV 42-Tab 2], at 10; Kids count, especially in campaign gifts, The Knoxville News-Sentinel, June 11, 1995, INT013265-INT013266 [DEV 42-Tab 2], at F3; Karin Wahl-Jorgensen, Some Folks Channel Political Gifts Through Children, Plain Dealer, May 28, 1995, INT013282-INT01328 [DEV 42-Tab 2], at 9A; David Mastio, Students Donate to Candidates, Tulsa World, March 11, 1995, INT013258-INT013260 [DEV 42-Tab 2].

3.7 It is clear that not all campaign contributions by minors are in fact donations by their parents. *See, e.g.*, Decl. of Jessica Mitchell ¶ 9 ('. . . I made a contribution to [Tim Feeney's] campaign just recently, in the amount of Five Dollars.') [1 Echols ES Tab 5]; Decl. of Pamela Mitchell ¶ 20 ('I have never used my daughter's name, or any other person's, in making a political donation, in order to avoid limits that the law places on my ability to support candidates of whom I approve.') [1 Echols ES Tab 10].

3.8 There have been a number of instances where the FEC has found that individuals have made contributions in their children's names in violation of campaign finance laws prohibiting the making of contributions in the name of another person.

3.8.1 The FEC found that an individual violated campaign finance laws by 'making four (4) contributions—$1,000 each—to four (4) Federal campaign committees in the name of his infant son during the calendar years 1992 and 1993.' FEC MUR 4484, INT 15778 [DEV 52-Tab 5]. The four campaign committees either returned the funds or disclosed the contribution as a debt owed to the contributor in an amended quarterly report in response to inquiries by the FEC. *Id.* at INT 15826-29. The contributor and the FEC entered into a conciliation agreement that included a civil penalty of $4,000. *Id.* at INT 15789-94.

3.8.2 The FEC found that a contributor contributed $1,000 in the names of his two daughters, ages 4 and 8, on November 7, 1988, the same day he made a $1,000 contributions in his own name. FEC MUR 3268, INT 15612 [DEV 43-Tab 3]. The Commission elected not to pursue its case against the contributor, in part because he had pled guilty to criminal charges of defrauding investors and had filed for bankruptcy. *Id.* at INT 15613.

3.8.3 The FEC found that a contributor donated $4,000 in postage stamps in 1993 to a federal campaign committee in the names of his seven and eleven year old children. FEC MUR 4048, FEC119-0008-09 [DEV 43-Tab 5]. The FEC and the contributor entered into a conciliation agreement, pursuant to which the contributor agreed to pay a $7,500 civil fine. *Id.* at FEC 119-0012.

3.8.4 The FEC found that a contributor took money from the bank accounts of his one year old and three year old children to make three $1,000 contributions in their names to federal candidates. FEC MUR 4255, FEC 101-0046-47 [DEV 134-Tab3].

3.9 FECA does not require political committees to seek or report the age of contributors. Gov't Br. at 202.

3.10 The FEC states that it 'faces unique and significant practical problems in attempting to investigate and prove whether a child knowingly and voluntarily made a particular contribution and thus whether the child's parent violated the contribution limits. Gov't Amended Proposed Findings of Fact ¶ 794. In some cases, parents have refused to submit their children to FEC questioning. FEC MUR 4254, USA CIV00932 [DEV 43-Tab 4] (report explaining that parents refused to allow their children to be questioned). The Commission maintains that determining whether or not children of a certain age are capable of making 'knowing and voluntary' contributions is a subjective undertaking, made more difficult by parental influence and what the FEC deems

to be 'self- serving affidavits.' Gov't Amended Proposed Findings of Fact ¶ 794; FEC MURs 4252-4255, General Counsel's Report at 5, 10, USA-CIV00925, 930-31 [DEV 43-Tab4] ('[I]t is difficult to accept the notion that children as young as eight years old are capable of 'knowingly and voluntarily' making the decisions to contribute to political campaigns. However, in the absence of anything in the Commission's regulations such as a presumption that a young child may not make contributions this becomes a very subjective decision. In this matter there does not appear to be any choice but to accept the assurance affirmed by affidavits that these were knowing and voluntary decisions.'). The FEC also claims that '[q]uerying youngsters about their knowledge of politics and their relationship with their parents may threaten the privacy of the family.' FEC Findings of Fact ¶ 794. In support of this contention, the Commission proffers a letter from an attorney representing a family investigated by the FEC which states

> [my clients] believe that the general process of inquiry of the instant FEC Docket is unduly intrusive into the privacy of their family affairs
>
> . . . .
>
> By the very act of responding truthfully to the instant Interrogatories and Document requests, [my clients] must open up their efforts to conduct their family affairs, to inculcate civic and political virtues and to teach values to their children to scrutiny by public officials . . . . The untoward effects are to . . . invade privacy and private communications of husband and wife and of parents and children and possibly to create disruption in normal family functioning merely by responding to an apparently legitimate FEC inquiry.

FEC MUR 4254, FEC119-0017, 0021 [DEV 43-Tab 4].